No. 972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

THEODORE C. McBRIDE,
Petitioner,

vs.

TOLEDO TERMINAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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INDEX.

Cases Cited.

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OPINIONS BY COURTS BELOW.

Petitioner, Theodore C. McBride, respectfully prays that a writ of certiorari issue to the Supreme Court of the state of Ohio to review the judgment and decision of that court in Case No. 34783, entitled Theodore C. McBride v. Toledo Terminal Railroad, which court in a judgment and opinion dated February 6, 1957, reversed the judgment of the Court of Appeals of Lucas county, Ohio. The opinion of the Supreme Court is reported in 166 Oh. St., 129, 140 N. E. 2d, 319. (R., 290) In the unreported opinion of the Court of Appeals for Lucas county, Ohio (App. B.), that court reversed the judgment of the Court of Common Pleas of Lucas county, Ohio, which court had vacated judgment

and verdict for petitioner and entered judgment notwithstanding the verdict for respondent. (R., 12) The memorandum of the trial court stating the basis for sustaining the respondent's motion for judgment is appended to this petition. (App. A.).

JURISDICTION OF THIS COURT.

The entry of the judgment of the Supreme Court of Ohio of which review is sought was dated February 6, 1957. (R., 282) Jurisdiction of this Court to review the said judgment of the Ohio Supreme Court by writ of certiorari is conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, U. S. C., Section 1257. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * * * * *
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes, of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the jury in response to an interrogatory prepared and submitted by the respondent railroad finds the "nature of the negligence, act or omission" of which respondent was guilty to be "no lighting—not a safe place to work," may a court by means of a judicial construction of that answer completely eliminate the jury's finding of an unsafe place to work and thereby set aside a general verdict for petitioner by limiting judicial consideration of

the evidence solely to that relating to "no lighting" as the cause of petitioner's injuries?

2. In an action under the Federal Employers' Liability Act was the state court correct in holding that the jury's finding of "no lighting—not a safe place to work" was one indivisible finding in the sole negligent respect of insufficient lighting when the evidence in addition to lack of lighting showed that: (1) there had been snow and constant below-freezing weather in the pertinent yards for several days prior to the night of petitioner's injuries; (2) there was snow and sleet on the night of and the night before petitioner's accident; (3) the cars in respondent's yards where petitioner was required to work were covered with ice and snow and had been in that condition for several days prior to the date of the accident; (4) petitioner was ordered to work under those conditions in those yards and upon those cars although respondent knew that petitioner's duties required him to climb up and down ladders on the cars; and (5) petitioner was injured while performing such duties when his foot slipped on an icy and snowy rung of the ladder on one of respondent's cars—all of which clearly formed the pattern of an unsafe place to work?

3. In this action under the Federal Employers' Liability Act was the jury's finding that the "nature of the negligence, act or omission" of respondent, namely, "no lighting —not a safe place to work,"—proximately caused petitioner's injury consistent with the general verdict for petitioner and supported by evidence when correctly tested by the principles governing judicial review set forth by this Court?

4. In an action under the Federal Employers' Liability Act may a state court's granting of the respondent railroad's motion for new trial conditioned upon the reversal

of a previously granted final judgment for the same respondent railroad be permitted to stand in the event of the reversal of such judgment for the railroad, where the grounds for the subsequent granting of the conditional new trial were identical to those supporting the judgment, namely, that there was not sufficient evidence of negligence and causation?

5. Was the trial court correct in refusing to submit to the jury the issue of the violation of the Safety Appliances Act where the evidence showed that petitioner, while on the ladder of one of several cars in a cut, observed that the car at the end of the cut did not couple automatically upon impact with another car and as a result went down the ladder of the car to investigate and while going down, slipped on an icy and snowy rung and was injured?

STATUTES INVOLVED.

The federal statutes involved in this review are those of the Federal Employers' Liability Act, particularly Section 1 thereof (Title 45, U. S. C., Section 51), and the Safety Appliances Act, particularly Section 2 thereof (Title 45, U. S. C., Section 2).

Jurisdiction of the federal claim by the state court is provided in Section 6 of the Federal Employers' Liability Act (Title 45, U. S. C., Section 56).

The following statutes of the state of Ohio, while not directly involved or controlling, will aid in an understanding of some of the issues in this appeal: Ohio Revised Code, Sections 2315.16, 2323.01, 2323.18 and 2323.181.

The foregoing federal and state statutes are appended to this petition. (App. E.)

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Court of Common Pleas of Lucas county, Ohio. The amended petition alleged (R., 1) and the answer to the amended petition admitted (R., 4) that petitioner was in the employ of the respondent as a conductor and that on the pertinent date, petitioner and respondent were engaged in interstate commerce. The action, therefore, arose and was tried under the provisions of the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following). The trial resulted in a general verdict for petitioner against respondent in the amount of $51,000, and judgment was entered accordingly in the Court of Common Pleas on January 18, 1955. (R., 12)

At the trial the grounds for recovery asserted by petitioner consisted in substance of respondent's using on its line a car with a coupler which failed to couple automatically on impact and respondent's negligence in causing petitioner to work in a known and unsafe place and under known unsafe conditions: ice and snow on the cars in the yard and particularly on the rungs of the ladders on those cars, which conditions had existed for several days prior to and including the date of the accident; no lighting at or about the place of accident; and no means provided to plaintiff for better traction.

There was ample testimony to show that unsafe conditions existed in the yards where petitioner was required to work in the darkness of early morning on January 31, 1951. Morris Leibovitch, brakeman on respondent's switching crew, testified that the only lights in the vicinity were on the property of the Baltimore & Ohio Railroad some 300

or 400 feet away and that those lights afforded very little light at the place of petitioner's accident. (R., 39, 40) He also testified that it was dark. (R., 65) Petitioner corroborated the fact that there was no lighting in the yard. (R., 118)

There was uncontroverted testimony to show the extremely hazardous weather that had existed for several days and the consequent slippery ice and snow on the cars, particularly on the rungs of the ladders. Brakeman Leibovitch testified, for example, that it was snowing, raining and freezing and quite cold on the night of plaintiff's injury. (R., 40, 60, 65) Witness Don E. Coleman, a meteorologist, described the extremely cold and hazardous weather conditions which had existed for several days prior to the date of the accident on January 31, 1951. (R., 88-93) His testimony shows that snow fell on several of the days from January 25 to January 31, inclusive, and that the temperature was constantly below freezing during that period. (R., 96, 97) The last day of maximum temperature above freezing prior to the thirty-first was the twenty-fourth. (R., 97) That testimony confirmed petitioner's statement that it was cold, icy and snowing on January 31 and that the weather was about the same as it was on the night before. (R., 70, 71) Petitioner further testified that all the cars in respondent's yards had been exposed to the weather and that they were icy and covered with snow. (R., 72)

Although such weather conditions had existed for several days and the cars had accumulated snow and ice, respondent ordered petitioner to go to work in its yards in Toledo, Ohio, on the date of the accident, January 31, 1951. (R., 69, 70) As the conductor, petitioner was primarily responsible for carrying out the orders. (R., 70) It was during a switching operation that petitioner slipped on the

icy rung of a side ladder located on one of respondent's cars. He was riding on the side ladder of one of a cut of cars which cut was being coupled onto three other cars on the track. After the impact he gave a backup signal and had the train move to see if all the cars were attached. Petitioner then saw that one of the cars, the 21st car in the cut, was not moving. He thereupon relayed a signal to the engine crew to stop the train, and went down the ladder to see what was wrong with the car which had not coupled. (R., 76) It was at that time that he lost his footing. (R., 76) He further testified that when he went to the 21st car that had not coupled, he found that the knuckle of the coupler was not in operative order and that the knuckle pin was closed. (R., 77-79) He also testified that the coupler was faulty. (R., 79) Previously petitioner had opened the knuckle of the coupling on the 21st car and had released the pin. (R., 74, 101).

In describing his accident, petitioner testified that his foot slipped out from under him and he caught himself with one hand, then regained his footing, and went down to the ground after crawling down the ladder. He further testified (R., 73):

"Q. Do you know what caused your foot to slip? A. Yes.

"Q. What? A. The rungs and ladder were icy—my foot gave way on the ice."

The slip and resulting strain severely injured petitioner. He was in pain immediately after the slip (R., 80) and went to see his family doctor, Dr. Lemon, on the next day. (R., 51, 81) In October, 1951, a spinal fusion operation was performed (R., 20, 136), and in June of 1953 a second operation was necessary upon his back. (R., 23) From the time of the injury up until and including the trial, peti-

tioner was unable to perform his regular work (R., 86, 87), and that disability is permanent. (R., 26, 140, 141)

The trial court refused plaintiff's special instructions numbered 4, 5, and 6 dealing with the violation of the Safety Appliances Act (Title 45, U. S. C., Sec. 1-16) arising out of the failure of the cars to couple on impact (R., 208, 209); and that issue was not submitted to the jury. (R., 205, 206)

The case was submitted to the jury on the issues of respondent's negligence and causation and the jury found generally in favor of petitioner. In addition to the court's instructions and at the request of respondent's counsel (R., 240) interrogatories were submitted to the jury requiring their findings upon particular questions of fact. These interrogatories were prepared by respondent's counsel. Under the pertinent Ohio statute, Ohio Revised Code, Section 2315.16, it is mandatory upon the trial court to instruct the jury to find upon particular questions of fact when either party so requests. The interrogatories submitted by respondent constituted, according to the trial court, a request for such findings of fact and the court accordingly submitted them to the jury. The first two of those interrogatories and the jury's answers thereto are as follows (R., 250):

> "Question No. 1: Was the defendant, The Toledo Terminal Railroad Company, guilty of any negligence, act or omission which proximately caused the injuries and damage of which the plaintiff, Theodore C. McBride, now complains?
>
> Answer: Yes
>
> Question No. 2: If your answer to the previous question is yes, state the nature of the negligence, act or omission of which the defendant, The Toledo Terminal Railroad Company, was guilty.
>
> Answer: No lighting—not a safe place to work."

Notwithstanding the foregoing general verdict for petitioner and the findings by the jury, the trial court subsequently vacated the judgment for petitioner and entered final judgment for respondent. (R., 12) Under the Ohio statutes (Ohio Revised Code, Sections 2323.18 and 2323.181), such a judgment was a final judgment rendered by the trial court upon its conclusion that respondent was entitled to such judgment as a matter of law. The grounds stated by the trial court in its memorandum granting defendant's motion for final judgment were (App. A):

> "Upon full consideration of the evidence in this case and interpreting it in the light most favorable to the plaintiff, the court has reached the conclusion, *as a matter of law, that there has been no proof of negligence on the part of the defendant. The finding of negligence is contrary to the law and the evidence.*
>
> "The court has reached the further conclusion, *as a matter of law*, that if there were any evidence of negligence on the part of the defendant, *there is no proof of proximate relationship* between the acts and negligence claimed and the accident and injuries of which the plaintiff complains. *The finding of proximate cause is contrary to the law and to the evidence.*" (Emphasis supplied)

After granting respondent's motion for final judgment the trial court indicated that it was also granting the same respondent's motion for new trial in the event of a reversal of judgment for respondent. An oral hearing was had upon settling the entry in connection with the motion for new trial. (R., 257-271) That hearing and the resulting entry (R., 13) show that the trial court granted the conditional new trial upon the very same grounds upon which it had previously rendered final judgment for the same respondent. Thus the trial court stated at the outset of the hearing (R., 257):

> "The Court: I might as well try to make it clear right now. I am still of the opinion that there was

no negligence shown on the part of the defendant, The Toledo Terminal Railroad Company, and if there was any evidence of negligence on the part of the Railroad Company, I am still of the opinion that that negligence, if any, was not the proximate cause of the injury sustained or claimed by the plaintiff. *I think that is all I had in mind when I ruled on the motion for new trial.*" (Emphasis supplied)

That same hearing also shows that the trial court granted the conditional new trial only because the court thought it had to do so under the Ohio statute (Ohio Revised Code, Section 2323.181), even though the court was of the opinion that the case had been well tried. (R., 263)

On appeal the Court of Appeals for Lucas county, Ohio, reversed the trial court's final judgment for respondent (R., 275), but dismissed petitioner's appeal from the trial court's order granting conditionally a new trial. (R., 278) In the course of its opinion (App. B), the Court of Appeals held that there was sufficient evidence of negligence and causation to support the judgment for petitioner and further held that the trial court had erred in refusing to submit to the jury the issue of the violation of the Safety Appliances Act.

Respondent appealed to the Ohio Supreme Court from the reversal of the trial court's judgment for respondent, and petitioner filed a cross-appeal from the decision of the Court of Appeals dismissing the appeal with respect to the conditional new trial. The Ohio Supreme Court on February 6, 1957, reversed the Court of Appeals and affirmed the judgment of the Court of Common Pleas which had been rendered for respondent. (R., 282) In its opinion (R., 290-294), the Ohio Supreme Court by judicial construction held that "the jury found the defendant negligent in but one respect, namely, insufficient lighting to

afford a safe place to work." (R., 292) From that point the court narrowed its examination of the record to lack of lighting alone and held that as a matter of law there was no proximate causation between the petitioner's injuries and the respondent's failure to provide lighting. The Ohio Supreme Court also quoted with approval the opinion of the dissenting judge of the Court of Appeals to the effect that petitioner had not only failed to establish the foregoing causal connection, but had also "failed to exclude the more reasonable inference that his injury was due to the slipping of his shoe from the rung of the ladder". (R., 293)

The Supreme Court of Ohio in its opinion failed to meet the issue relating to the violation of the Safety Appliances Act.

ARGUMENT.

Summary.

The Supreme Court of Ohio has denied petitioner a verdict and judgment under the Federal Employers' Liability Act which the Ohio Court of Appeals had restored to him. This petition, however, is not a mere request to this Court to resurvey the evidence where two other courts have disagreed. This petition, on the contrary, seeks to correct fundamental errors in the very nature and method of judicial review of an action of this kind where interrogatories or special findings are involved. The Ohio Supreme Court's decision was not based upon a lack of evidence or upon other jury findings; it was based upon its own construction of consistent findings of the jury by means of which a substantial part of the evidence was simply eradicated from the record upon review. Although the jury found the nature of respondent's negligence to be "no lighting—not a safe place to work," the Supreme Court of Ohio dismissed the finding of an unsafe place to work and examined the record through a judicial microscope centered solely upon lack of lighting. Upon such minute examination of a single factor, the Supreme Court of Ohio reached the erroneous conclusion that the lack of lighting could not as a matter of law have been the proximate cause of petitioner's injury.

A reasonable judicial construction of the jury's finding should at least have required the court upon review to give weight and consideration to all other factors in the record in addition to the lack of lighting, and certainly to those relating to or reflecting upon an unsafe place to work. This the Supreme Court of Ohio refused to do, and directly violated a series of decisions by this Court holding that a

jury's finding of a negligent unsafe place to work must not be disturbed by judicial review if there is evidence of any probative value to support that finding. *Lavender v. Kurn*, 327 U. S., 645.

Such refusal also was in direct conflict with the many decisions of this Court and other courts holding that in determining the legal sufficiency of a finding of an unsafe place to work, a reviewing court must search the record and give weight to the factors and circumstances as a whole. *Union Pacific Co. v. Hadley*, 246 U. S., 330; *Bailey v. Central Vermont R. Co.*, 319 U. S., 350; *Blair v. B. & O. R. Co.*, 323 U. S., 600.

The Ohio Supreme Court based its action upon an implied holding that the jury's finding of an unsafe place to work in response to an interrogatory was a meaningless conclusion and could therefore be stricken from consideration. This the Supreme Court purported to accomplish not by resort to other jury findings (see *Panhandle & Santa Fe Ry. Co. v. Arnold*, 283 S. W. 2d, 303, certiorari granted 352 U. S., 820), but by its own restrictive interpretation of the jury's answer.

In cases too numerous to cite (see, for example, *Schulz v. Pennsylvania R. Co.*, 350 U. S., 523) this Court has held such an issue as a negligent failure to provide a safe place to work to be one for the jury. The state court would strike that finding as a conclusion, even though this Court has held repeatedly that this is the very type of finding which is peculiarly for the jury. In short, through the means of interpreting a finding in answer to an interrogatory, the Ohio Supreme Court would seek to accomplish what it could not lawfully do if the same finding were implicit in a general verdict, and supported by the same evidence. This fundamental error should be promptly corrected by this Court.

The Ohio Supreme Court also applied an erroneous concept of proximate cause, a concept which has been specifically condemned by this Court in the recent case of *Rogers v. Missouri-Pacific Company*, —— U. S., ——, 77 Sup. Ct., 443. The Ohio Supreme Court held as a matter of law that there was no proximate cause between lack of lighting and the injuries because petitioner was not looking at the rung when his foot slipped from the rung. The court, moreover, applied the test that the petitioner had not excluded the more reasonable inference that the injury was due to his slipping from the rung. This Court has held many times that an employee in actions under the Act need not exclude other inferences than the one the jury chooses to draw. Moreover, the very basis for the Ohio Supreme Court's decision shows a complete misconception of the law governing causation under the Act. The test is not whether something else was the immediate or direct cause of the injury; the test laid down by this Court is whether negligence played any part, even the slightest, in producing the injury. That test, correctly applied, could only have resulted in affirmance of the general verdict and judgment for petitioner.

The trial court, purporting to act under Ohio statutes, granted respondent's motion for new trial conditioned upon a reversal of final judgment for the same respondent which had previously been entered; the conditional new trial was granted upon the very same grounds upon which the final judgment had previously been entered. The Ohio Supreme Court approved such action on the basis of the Ohio statute. (Ohio R. C. 2323.181) It is clear that no state rule, be it called substantive or procedural, may bar a federal claim or serve to vacate and set aside a jury finding where there is evidence of probative value to support that finding. This Court has clearly directed that a state court may not re-

verse on the weight of evidence and grant a new trial if there is evidence of any probative value to support the finding. *Harsh v. Illinois Terminal R. Co.*, 75 Sup. Ct., 363, reversing 144 N. E. (2d), 901. A fortiori, a state court may not reverse and grant a conditional new trial upon the grounds of lack of evidence of negligence and causation in the event that this Court or the ultimate reviewing court hold that there *is* sufficient evidence of negligence and causation! In short, the order granting the conditional new trial may not stand against the controlling federal law.

Finally, the trial court denied the petitioner's claim grounded upon violation of the Safety Appliances Act when the cars failed to couple automatically upon impact. The only basis of such action was the court's holding as a matter of law that the violation could not have been the proximate cause of petitioner's injury. The Court of Appeals reversed the trial court in this respect, but the Ohio Supreme Court did not mention this issue. Since the Federal Employers' Liability Act and the Safety Appliances Act are in pari materia, the test should have been whether the violation of the absolute duty (failure to couple upon impact) played any part, even the slightest, in producing petitioner's injury. Under that test it is clear that the issue of causation should have been submitted to the jury.

Questions Nos. 1 and 2.

The Ohio Supreme Court vacated a verdict and judgment for petitioner in this action by the expedient of its judicial construction of an answer by the jury in response to an interrogatory prepared by respondent's counsel. The question called for the jury to state the "nature of the negligence, act or omission" of which respondent was guilty. The jury replied: "no lighting—not a safe place to work".

(R., 250) These were jury findings, yet the *court* eliminated the finding of an unsafe place to work as meaningless and held the respondent negligent in but one respect, namely, insufficient lighting. (R., 292) From that false starting point the court proceeded to the equally false conclusion that insufficient lighting as a matter of law was not the proximate cause of petitioner's injuries, since he was not looking at the rung of the ladder at the time his foot slipped from the rung. In short, in order to reach the conclusion as a matter of law that there was no proximate cause, the court started with the false premise that the *court* could affirmatively eliminate every factor in the record except lack of lighting.

Such judicial elimination of a finding by the jury was a serious invasion of the jury's domain, and presents a contrast to the decision in the case of *Panhandle & Santa Fe Ry. Company v. Arnold*, 283 S. W. 2d, 303. In the *Arnold* case the *jury* eliminated the specific respects of negligence by a series of special and specific findings after finding that the railroad had not furnished the employee a reasonably safe place to work. The Texas Court of Civil Appeals held that since the jury had specifically negated each item of negligence which could have caused the injuries, the finding of failure to furnish a reasonably safe place to work could not stand. By way of contrast in this case, all other factors than lighting were eliminated by the *court* through a state judicial construction of a jury finding which did affirmatively find negligence in one specific respect in addition to the unsafe place to work.

This Court has granted certiorari in the *Arnold* case (352 U. S., 820, 77 Sup. Ct., 58), and at the date of preparing this petition a decision in that case has not been rendered. A reversal of the Civil Court of Appeals of Texas in the *Arnold* case would require, a fortiori, a reversal of

the Supreme Court of Ohio in this case. An affirmance of the *Arnold* decision, on the other hand, would in no way preclude a reversal of the Ohio Supreme Court in this case. The Texas court at least purported to test the jury finding of an unsafe place to work by resort to other specific *findings* of the *jury*. Here the Ohio Supreme Court eliminated the jury's finding of an unsafe place to work by means of its own judicial construction.

In other words it is one thing for a court to hold that a finding of an unsafe place to work is inconsistent with the jury's findings in all other respects; it is quite a different thing for a court to eliminate such a finding even though consistent with the other specific finding of the jury and the evidence in the case. Whether or not the former is correct, the latter is clearly error.

This leads to a further fallacy inherent in the Ohio Supreme Court's decision, namely, that the finding of an unsafe place to work is only an indivisible and meaningless part of the finding of "no lighting." The Supreme Court of Ohio treated this case precisely as if the jury had found "no lighting," period. Under such reasoning, if the jury had answered the second question by simply stating "not a safe place to work," the Ohio Supreme Court would strike that finding completely and proceed to render final judgment for respondent!

Such a holding would be contrary to common sense as well as to the decisions of this Court. How, then, can the same action be magically transformed into logic or lawfulness simply because the jury preceded the finding of an unsafe place to work by a further finding, "no lighting", particularly where the two are separated by a dash? The conclusion is inescapable that the Supreme Court of Ohio by its construction simply wiped out the finding of an unsafe place to work.

This action was in complete violation of a long line of cases decided by this Court. This Court has decided time and again that in cases arising under the Federal Employers' Liability Act the railroad has a continuing duty to use due care to furnish its employee a safe place to work; and when the jury finds that the railroad has failed to use such care to furnish a safe place to work, that finding may not be upset if there is evidence of any probative value to support it. *Lavender v. Kurn*, 327 U. S., 645; *Bailey v. Central Vermont Rwy. Co.*, 319 U. S., 350; *Blair v. B & O. R. Co.*, 323 U. S., 600; *Wilkerson v. McCarthy*, 336 U. S., 53; *Schultz, Admrx. v. Pa. R. Co.*, 350 U. S., 523.

Respondent throughout the course of this case has attempted to avoid the foregoing law and line of cases by claiming that those cases do not apply since they involved general verdicts and this case involves special findings of fact. This is obviously an attempt to avoid meeting the issue. Irrespective of whether the finding is called general or specific, the fact remains that the jury in this case did make a finding of an unsafe place to work. The issue, therefore, is simple: is the finding of an unsafe place to work one which a reviewing court must regard precisely like any other finding, or may the court ignore and dismiss such a finding as meaningless? Stated in the terms of this case, the issue is: must the court test such a finding by evidence, or is the court free to eliminate that finding simply because it is made in response to an interrogatory along with another finding of negligence? The repeated directions of this court are clear and decisive: such a finding must stand if there is evidence of any probative value to support it. What possible difference can there be in logic or law whether that finding is inherent in a general verdict or explicity stated in a special finding?

The basis for the Ohio Supreme Court's holding (implied, but not clearly and openly stated) is that the finding of an unsafe place to work is only a conclusion derived solely from the lack of lighting. Regardless of what a state court choses to designate such a finding, the important point is that it is one for the jury. Indeed this Court has held repeatedly that such ultimate findings are for the jury. The very essence of the jury's function is to draw conclusions and to make ultimate findings. It cannot be seriously disputed that the existence on non-existence of an unsafe place to work is an ultimate finding peculiarly within the province of the jury. It is, therefore, the height of inconsistency to strike such finding as a conclusion when made by the very tribunal whose function it is to make such an ultimate finding.

This leads to a further serious and related error committed by the Ohio Supreme Court in its judicial review of the jury's verdict and findings. This Court has held time and again that the federal rule of unitary negligence applies in these actions and that in testing the legal sufficiency of a jury verdict or finding, the court must give weight to all the factors and circumstances as a whole. *Union Pacific Co. v. Hadley*, 246 U.S., 330; *Bailey v. Central Vermont R. Co.*, 319 U.S., 350; *Blair v. B. & O. R. Co.*, 323 U. S., 600. Again respondent throughout this case has attempted to avoid the foregoing law by stating that this is a case of specific negligence and not unitary negligence. This is another argument to avoid the issue, for such a contention assumes the negative of the very point in dispute, namely, does a finding of an unsafe place to work reflect all the factors and circumstances as a whole as shown by evidence? The answer of this Court in the foregoing cases is obviously "yes". A reviewing court must give consideration to all the facts and circumstances as a

whole in testing the legal sufficiency of a verdict based upon an unsafe place to work. *Bailey v. Central Vermont R. Co.*, 319 U.S., 350; *Blair v. B. & O. R. Co.*, 323 U.S., 600. Similarly in specifying the nature of respondent's negligence as "not a safe place to work," the jury undoubtedly considered all the facts and circumstances as a whole. Not only was such consideration reasonable, but it was in accordance with the court's charge on unitary negligence (R. 207). Under that charge the jury should have and undoubtedly did consider the entire pattern in this case as presented by the evidence. That can only lead to the conclusion that in addition to the absence of lighting, the jury considered the following circumstances and facts: (1) that extremely hazardous weather conditions had existed for at least five days continuously prior to and including the date of the accident; (2) that the cars and yards where petitioner was ordered to work were covered with snow and ice and had been so covered during that preceding period; (3) that petitioner was ordered to work under those conditions when obviously the railroad officials knew that they existed and knew that his duties required him to go up and down the ladders of the cars; and (4) that petitioner was injured while performing his duty under those conditions when petitioner's foot slipped and gave way on one of the icy rungs of a ladder on one of respondent's cars.

The nature of the duty to furnish a safe place to work lends further support to the foregoing. The railroad under the decisions of this Court must use due care to furnish its employees a safe place to work. That duty is in addition to the specific acts or omissions of negligence set forth in Section 51 and existed at common law. The pattern of conduct and circumstances as a whole, therefore, may well be greater than the sum of the various "parts",

that is, the specific items of alleged negligence. *Union Pacific Co. v. Hadley*, 246 U.S., 330. It follows that a jury, after surveying all the facts and circumstances as a whole, may find a negligent unsafe place to work; and at the same time consistently find that each item of alleged negligence, considered separately, does not constitute negligence. This may have been the basis for the jury's finding of failure to provide a reasonably safe place to work in the above mentioned case of *Panhandle & Santa Fe Ry. Company v. Arnold*, 283 S.W. 2nd, 303, centiorari granted 352 U.S., 820. If the evidence as a whole in that case supported such a finding, we submit that the findings negating the various specific items of negligence were not necessarily inconsistent with and did not vitiate the former finding.

The instant case, of course, does not press consideration to such an extent. Decision in this case does not require an examination and reconciliation of one finding and the general verdict with what are seemingly inconsistent other findings. Here *all* the findings of the jury, including the general verdict, are harmonious and consistent. The findings and verdict, moreover, are consistent with the evidence. It is only by means of judicial elimination of a large body of the evidence that the Supreme Court of Ohio could arrive at its conclusion of no proximate cause.

This is not a case, therefore, where the primary issue is a resurvey of the evidence to determine whether a jury issue has been presented. This is a case where the Ohio Supreme Court eliminated a goodly portion of the evidence by its own judicial construction of the jury's answer. In short, the Supreme Court of Ohio rather than to test the finding of an unsafe place to work by the evidence in the record, simply eliminated that finding in spite of the record. The court's error is aggravated by the fact that respondent's counsel invited such an answer by the word-

ing of his interrogatory. Certainly the answer, "not a safe place to work," is responsive to a question asking the jury to state the nature of respondent's negligence. It is almost inconceivable that a court would construe the answer to such an interrogatory most adversely against the opposing party, rather than against the party who prepared the question. Yet the Ohio Supreme Court construed the answer as if the jury had stated: "Not a safe place to work because of no lighting, and no lighting alone, without considering or giving any weight to any other factor."

Such a judicial construction by a state court of a jury finding cannot deny the petitioner's federal right to a judgment in accordance with the jury's finding. This is particularly true where the verdict and judgment are supported by evidence and the verdict is set aside solely by means of applying such a construction to a jury finding. The right of the jury to draw inferences of negligence is controlled by federal law in these cases although such right (commonly called the doctrine of res ipsa loquitur) is concerned with evidence and with conclusions. *Jesionowski v. Boston & Maine R. Co.*, 329 U.S., 452. Nor can any state rule or construction of pleading (as contended by respondent in this case) operate to deny a federal right under the Act. *Brown v. Western R. Co.*, 338 U.S., 294. Similarly a state's rule whereby an appellate court may reverse on the weight of the evidence must not be applied to disturb the findings and conclusions by a jury where there is evidence of any probative value to support the jury's conclusions. *Harsh v. Illinois Terminal R. Co.*, 75 S. Ct., 363, reversing 144 N. E. 2d, 901.

It follows, with greater force, that a jury's finding and petitioner's federal right to judgment may not be set aside under the guise of applying state procedure or

construction to that same finding. This fundamental error should prompt granting of certiorari and the reversal of the Ohio Supreme Court.

Question No. 3.

The Ohio Supreme Court purported to reduce the question in this case to its lowest terms as follows (R. 292):

> "Whether the record discloses evidence from which reasonable minds may reach different conclusions as to proximate causation between the plaintiff's injuries and the defendant's negligence in failing to provide adequate lighting."

The question is neither fairly nor completely stated. It assumes what we have previously pointed out to be a fallacy; namely, that the finding of an unsafe place to work has been eliminated from the case. A complete and fair statement of the question in this case is as follows: Does the evidence support with reason the conclusion that the respondent's negligence in the nature of "no lighting—not a safe place to work" played any part, even the slightest, in producing petitioner's injury?

If the scope of the judicial review of the evidence in this case had been expanded in accordance with the foregoing question, the answer would clearly have been in the affirmative. Certainly the jury with reason could conclude that the following facts and circumstances played some part in producing petitioner's injury—the dark and unlighted yard, the accumulation of ice and snow on the cars in the yard for a period of five or more days, the knowledge that petitioner's duties would require him to go up and down icy and slippery ladders, the order to go to work under those conditions, and the slip and fall from one of the rungs of an icy and slippery ladder—all of which reflected upon an unsafe place to work.

The foregoing appraisal is the one that should have been made under the most recent decision of this Court on the issue of proximate cause. *Rogers v. Missouri-Pacific R. Co.*, — U. S., —, 77 Sup., Ct., 443. A reasonable construction of the jury's finding would certainly require a reviewing court at least to give some weight and consideration to all the factors in the evidence in addition to the absence of lighting. Otherwise the jury's finding of an unsafe place to work and its finding of proximate cause have been set aside without even a reference to the surrounding circumstances which support those findings.

This Court and many others have upheld liability based upon dark and unsafe conditions; and in many of those decision, the darkness obviously played a very small part in producing the injury or death. *Schulz, Administratrix, v. Pennsylvania R. Co.*, 350 U.S., 523; *Smalls v. Atlantic Coastline R. Co.*, 348 U.S., 946, reversing 216 Fed. (2d) 842; *Lavender v. Kurn*, 327 U.S. 645; *Tiller v. Atlantic Coastline R. Co.*, (1st appeal) 318 U.S., 54 (2nd appeal) 332 U.S., 574; *Southern Railway Company v. Neese*, 216 Fed. 2d 772; *Pearce v. LeHigh Valley R. Co.*, 157 Fed. 2d 252, (C.C.A. 3, 1946); *Boston & M. R. R. v. Cabanna*, 148 Fed. 2d, 150 (C.C.A. 1, 1945); *Johnson v. Elgin, J. & C. Ry. Co.*, 87 N.E. (2d), 567, 338 Ill. App. 316; *Cade v. Atchison, T. & S. F. Ry. Co.*, 265 S. W. (2d), 366 (Sup. Ct. of Mo., 1954); *Luthy v. Terminal R. Ass'n of St. Louis*, 243 S. W. (2d), 332 (Sup. Ct. of Mo., 1951); *Curtis v. Atchison, T. & S. F. Ry. Co.*, 253 S. W. (2d), 789 (Sup. Ct. of Mo., 1952).

Many other decisions arising under the Act have upheld liability based solely upon unsafe conditions due to weather. *Anderson v. Elgin, Joliet & Eastern R. Co.*, 227 Fed. 2d, 91; *Fort Worth & Denver City R. Co. v. Smith*,

206 Fed. 2d, 667; *Fugazzi v. Southern Pacific Company*, 208. Fed. 2d, 205; *Skidmore v. B. & O. R. Co.*, 167 Fed. 2d, 54.

The Ohio Supreme Court's decision was not only in conflict with the foregoing decisions, particularly those by this Court, but its holding directly violated the mandate laid down by this Court concerning causation. The core of the Ohio Supreme Court's reasoning (after erroneously narrowing the scope of its review to lighting alone) was that lack of lighting did not proximately cause the injuries, since petitioner was not looking at the rung of the ladder at the precise time his foot slipped from the rung. The Ohio Supreme Court's erroneous concept of proximate cause is patently revealed in that part of its opinion where the court held that petitioner did not exclude the more reasonable inference that his injury was caused by slipping from the rung of the ladder. Such a concept is, of course, in utter and complete conflict with the holding of this Court upon that very point in the case of *Rogers v. Missouri-Pacific R. Co.*, — U.S., —, 77 Sup. Ct., 443, wherein this Court stated at page 448:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. *It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,* including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows

> the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part* to its negligence.'" (Emphasis added.)

Upon judicial review, therefore, it is irrelevant that the jury could find that the direct cause of petitioner's injury was the slipping of his foot from the icy or snowy rung of the ladder. The test is not whether the injury was or could have been caused directly by something else; the test is whether respondent's negligence played any part, even the slightest, in producing the injury. Had the Ohio Supreme Court applied this test, the finding and verdict for petitioner would have been affirmed.

Causal connection was not as a matter of law eliminated simply because petitioner was not looking at his feet or at the rung of the ladder at the time of the slip. Even from a narrow point of view of the record the lack of lighting could well have played some part in petitioner's injury. Because of the darkness petitioner may well have been precluded from discerning the condition of that particular ladder either on his way up or as he started to descend. That he was not looking at the rung at the time he slipped and fell bears only upon his contributory negligence, which the jury did find in this case with resulting reduction in damages of 40 per cent.

Question No. 4.

The trial court in this case vacated verdict and judgment for petitioner and granted respondent's motion for judgment notwithstanding the verdict (R. 12). The trial court's statement in its memorandum shows that the court's basis for the judgment was its conclusion that the finding of negligence and proximate cause were contrary to the law and the evidence (App. A).

Subsequently, purporting to act under the pertinent Ohio statute (Ohio Revised Code, Section 2323.181), the trial court granted the same respondent a new trial conditioned upon a reversal of its previously entered judgment for respondent. A hearing to settle the entry in connection with the new trial conclusively shows that the trial court granted the conditional new trial upon the very same grounds upon which it had previously entered final judgment for respondent (R. 257). That hearing also shows that the trial court granted the conditional new trial only because it was of the opinion that it had to do so under the foregoing statute, even though the trial court was of the further opinion that the case had been well tried (R. 263). The Ohio Supreme Court approved this wholly inconsistent action upon the basis of the same statute.

In the event that this Court reverses and holds that there was sufficient evidence of negligence and causation to support the verdict and judgment, the question is whether the state action granting the conditional new trial upon an adverse holding with respect to the identical issues may be permitted to stand.

The answer to this question has already been decisively given by this Court in the case of *Harsh v. Illinois Terminal R. Co.*, 75 Sup. Ct. 363, reversing 144 N.E., 2d 901. In that case the Appellate Court of Illinois held that it could apply state law and reverse a judgment for the employee on the weight of the evidence and grant the railroad a new trial. This Court reversed the Illinois court and restored judgment for the employee upon the authority of *Lavender v. Kurn*, 327 U.S., 645. In short, this Court has issued the clear mandate that if there is evidence of any probative value to support a jury verdict and judgment, no state law

permitting a reversal and granting of a new trial on the weight of the evidence can operate to set aside that judgment. It follows with greater force, therefore, that no state action which permits a new trial conditioned upon reversal of a final judgment for the respondent can operate to set aside a subsequent reversal and judgment for petitioner where the granting of the conditional new trial was based solely upon a holding adverse to that of this Court upon the identical issues: sufficiency of negligence and causation.

Question No. 5.

The trial court in this case refused to charge or submit to the jury the issues of a violation of the Safety Appliances Act. Title 45, U.S.C. Section 2 (R. 205, 206). This error was reversed by the Court of Appeals but the Supreme Court of Ohio restored final judgment for respondent without meeting the issue of the Safety Appliances Act.

The primary basis for the action of the trial court was that the failure of the cars to couple automatically upon impact, a violation of the absolute duty imposed by the Act, could not as a matter of law have been the cause of petitioner's injury. (R. 206). This was error under the controlling decisions of this Court. The Federal Employers' Liability Act and the safety acts are in pari materia. *Affolder v. N. Y., Chicago & St. L. R. Co.*, 339 U.S., 96; *Carter v. Atlanta & St. Andrew Bay R. Co.*, 338 U.S., 430; *Coray v. Southern R. Co.*, 335 U.S., 521; *Urie v. Thompson*, 337 U.S., 163; *McCarthy v. Pennsylvania R. Co.*, 156 Fed. (2d), 877. Under the test recently reaffirmed and restated by this Court the issue was as follows: Did the evidence justify the conclusion that the violation of the

absolute duty (failure of the cars to couple automatically upon impact) played any part, even the slightest, in producing the petitioner's injury? On the record of this case, the jury could have so concluded. Petitioner had previously opened the knuckle of the pertinent coupler. (R. 74, 101). The cars failed to couple automatically upon impact and petitioner was injured at the time when he was going down the ladder to see why the cars had not coupled (R. 76). His testimony further revealed that the knuckle of the coupler was not in order and that the knuckle pin was closed (R. 77-79). Upon such evidence the jury could well have concluded that the failure to couple automatically upon impact was a violation of respondent's absolute duty and such violation played some part, even the slightest in producing the petitioner's injury. *Affolder v. N. Y., Chicago & St. L. R. Co.*, 339 U.S., 96; *Carter v. Atlanta & St. Andrew Bay R. Co.*, 338 U.S., 430. See also *Coray v. Southern R. Co.*, 335 U.S., 521; *New York, New Haven & Hartford R. Co. v. Leary*, 204 Fed. 2d, 461, 467; *Givens v. Missouri-Kansas-Texas R. Co. of Texas*, 195 Fed. 2d, 225. This issue, accordingly, should have been submitted to the jury.

CONCLUSION.

The Supreme Court of Ohio upon judicial review of this case felt free to place its own restrictive interpretation upon special findings by the jury—an interpretation most favorable to the respondent whose interrogatories prompted such findings. This was a judicial invasion of the heart of the jury's domain through the back door, so to speak. The court simply held that the jury's special findings meant exactly what the court thought they meant or should mean. The general verdict and findings were

not tested by the evidence or consistency with each other, but by the court's construction of those findings imposed as a matter of law.

This fundamental error reveals a somewhat different method of judicially upsetting a jury's verdict, and this error alone requires prompt correction by his Court.

The Supreme Court of Ohio's patently erroneous concept of causation applied in this case adds further urgency for review and reversal.

Respectfully submitted,

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APPENDIX A.

Memorandum of the Court of Common Pleas on Motion of Defendant For Judgment and For a New Trial.

O'Connor, J.:

This matter comes before the court upon the motion of the defendant for judgment and for a new trial. Under the Ohio statute, the motion for judgment is considered first.

Both parties have filed briefs and this motion was argued at length by counsel for both parties on March 18, 1955.

Upon the trial of this case, the plaintiff claimed misconduct and negligence in four specifications. The court withdrew from the consideration of the jury the claim of Violation of the Safety Appliance Act that automatic couplers were defective in failing to couple on impact. There was no evidence that the couplers were defective or that there was any proximate causal relationship between this claim and plaintiff's accident or injuries.

In response to interrogatories submitted, the jury found the defendant not negligent in two respects claimed by the plaintiff and negligent in "no lighting—not a safe place to work."

Upon full consideration of the evidence in this case and interpreting it in the light most favorable to the plaintiff, the court has reached the conclusion, as a matter of law, that there has been no proof of negligence on the part of the defendant. The finding of negligence is contrary to the law and the evidence.

The court has reached the further conclusion, as a matter of law, that if there were any evidence of negligence on the part of the defendant, there is no proof of proximate

causal relationship between the acts and negligence claimed and the accident and injuries of which the plaintiff complains. The finding of proximate cause is contrary to the law and to the evidence.

Defendant's motion for judgment should be granted.

A journal entry may be drawn reciting the decision of the court as stated in this memorandum.

APPENDIX B.

Opinion of the Court of Appeals.

Conn, J.:

This case arose under the Federal Employers' Liability Act, Title 45, U. S. Code, Sec. 51, and the Federal Safety Appliances Act, Title 45, U. S. Code, Secs. 1 to 16.

The action was brought by plaintiff in the Common Pleas Court to recover damages for personal injuries, on the ground of negligence. The jury returned a verdict for plaintiff in the amount of $51,000.00 and judgment was entered on the verdict.

The defendant moved for judgment notwithstanding the verdict and also filed a motion for a new trial. The trial court granted the motion of defendant for a judgment, from which judgment, on April 27, 1955, plaintiff appealed to this court, No. 4872, on questions of law.

Subsequently the trial court, on June 22, 1955, granted defendant's motion for a new trial, conditioned upon a subsequent reversal of the judgment entered April 27, 1955, under the provisions of Secs. 2323.18 and 2323.181 of the Revised Code of Ohio.

From the order and judgment granting plaintiff a new trial conditionally, plaintiff appealed on questions of law to this court, No. 4879.

On November 7, 1955, defendant's motion to dismiss the appeal in case No. 4879 was overruled and plaintiff's motion (appellant herein) to consolidate the two appeals for hearing was granted.

In substance, plaintiff alleges in his amended petition that on or about January 31, 1951, he was employed by defendant as conductor in defendant's yard in and about Toledo, and assigned the job of switching and classifying cars in defendant's yard, and at all times herein plaintiff and defendant were engaged in interstate commerce.

Plaintiff further alleged that on said date plaintiff, in the course of his duties, was put to work in defendant's yard, which work included climbing upon and down on cars, which at the time were covered with deposits of snow and ice, all of which defendant had knowledge; that at about 5:45 o'clock a. m. on said date, plaintiff was required to and did climb the ladder of a car, which was one of a cut of cars, in the course of his duties; that he observed upon giving a back-up signal, two of the cars failed to couple automatically upon impact; that plaintiff was required to descend the side ladder in order to go back and take necessary action to get said cars together; that in descending said ladder, one of plaintiff's rubber galoshes slipped off of the ice-covered rung, causing plaintiff's body to go down suddenly and his back and arms jerked in a sudden and forceful manner, injuring plaintiff.

That defendant failed in its duty to plaintiff, which failure proximately contributed to cause his injuries herein, in the following respect, in using on its line a car equipped with a coupler which did not couple automatically upon impact.

Plaintiff further alleged that defendant was negligent, which negligence proximately contributed to cause his injuries in this to wit: that defendant caused and permitted

plaintiff to work in a place and under conditions that were unsafe at said time and place, in the following particulars: (1) in that the rungs of the ladders on the cars in defendant's yard were and had been for several days coated with ice; (2) in that it was during hours of darkness and there were no lights or lighting at or about said place; (3) in that no device or means was furnished by defendant to provide plaintiff's boots with better traction on said icy places.

It was alleged further that plaintiff was injured in the muscles, tendons and nerves of plaintiff's lower back, hips and ribs and the intervertebral disc and lamina between the fourth and fifth vertebrae; that plaintiff was obliged to have medical care and surgical operations; that plaintiff had experienced great suffering and is unable to work; that he incurred hospital and medical expenses in the approximate amount of $1,150.00 and that his earning capacity has been permanently impaired. Plaintiff prays judgment in the amount of $85,000.00.

Defendant in its answer admits that plaintiff was in its employ on said date as a brakeman, and that it was engaged in interstate commerce. Defendant denies generally the remaining allegations of plaintiff and affirmatively alleges that if it were negligent, which it denies, plaintiff himself was guilty of negligence proximately causing or contributing to cause his injuries, and defendant further alleged that plaintiff failed to seek or accept employment.

Plaintiff's evidence tended to support the allegations in his petition, as briefly outlined above, having reference particularly to plaintiff's duties, he being primarily responsible for the switching operation, spotting cars, etc., and that plaintiff slipped on an icy rung of a side ladder on one of a cut of cars on which plaintiff was riding for

the purpose of coupling said cars onto three other cars on a spur track.

It further appears from plaintiff's testimony that after the coupling impact, plaintiff gave a back-up signal to have the train moved in order to ascertain if the cars were coupled; that observing the last car in the cut was not moving, plaintiff thereupon relayed a signal to the engine crew to stop the train, and in going down the ladder in order to ascertain what was wrong with the car which had not coupled, plaintiff slipped and wrenched his back; that after proceeding to the ground and resting a few moments, plaintiff went to the car that had not been coupled, found the pin and coupler was not in operative order and that the knuckle pin was closed, although plaintiff had previously opened the knuckler and released the pin; that plaintiff thereupon moved the coupler over to line it up, and with both knuckles open, the car thereupon automatically coupled upon impact.

Plaintiff also testified there was no lighting system whatsoever in the portion of the yard where plaintiff received his injury and that he could see the snow and ice on the rungs of the ladder by the light of his switch lamp.

There was some corroborating testimony as to the weather conditions, plaintiff slipping and losing his balance on the side ladder, the relaying of signals, and that there was no lighting system in the immediate vicinity where plaintiff was employed.

Plaintiff's evidence, including the medical testimony, tended to support the claim that plaintiff sustained substantial and painful injuries, incurred expenses alleged, and that his earning capacity was greatly impaired.

Plaintiff's assignment of errors are:

1. That the trial court erred in sustaining defendant's motion for judgment notwithstanding the verdict and judgment entered thereon.

2. Error of the trial court in withdrawing from the jury "the allegations relating to the failure to couple" and in refusing to give plaintiff's requested instructions before argument numbered 4, 5, 6 and 7, relating to the violation of the Safety Appliances Act.

3-4. That the trial court exceeded its authority and abused its discretion in conditionally sustaining defendant's motion for a new trial after having entered judgment for defendant and in precluding this court from reinstating the verdict of the jury on which judgment was entered for plaintiff.

First, giving consideration to plaintiff's assignment of error No. 2.

Sec. 2 of the Federal Safety Appliances Act (Title 45, U. S. C., Secs. 1-16) provides:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, Sec. 2, 27 Statute 531."

Under the federal decisions, it appears that the statute imposes an absolute duty on common carriers engaged in interstate commerce, unrelated to negligence. The absence of a defect can not aid the railroad company, if the coupler was properly set to couple and fails to couple, unless there is an absence of causal relation.

We call attention to the somewhat recent case of Carter v. Atlantic & St. Andrews Bay Rd. Co., 70 S. Ct. Rep., 226 (338 U. S., 430), where it was held that when "once a violation of the Safety Appliances Act is established, only causal relation is in issue * * *".

The first section of syllabus 1 reads:

> "(s) The duty imposed on an interstate railroad by the Safety Appliance Act to equip cars with couplers coupling automatically by impact is an absolute duty unrelated to negligence, and the absence of a 'defect' can not aid the railroad if the coupler was properly set and failed to couple."

In Affolder v. N. Y., C. & St. L. Rd. Co., 70 Sup. Ct. Rep., 509 (339 U. S., 96), the court, while adhering to the rule announced in the Carter case, supra, pointed out that the railroad would have a good defense where the coupler had not been properly opened. In the instant case, plaintiff testified that he had previously opened the knuckle and released the pin. See Corey v. Southern Pacific R. Co., 69 Sup. Ct. Rep., 275 (335 U. S., 520).

When plaintiff discovered that upon impact the car did not couple, it was his duty to investigate and, to do so, he was required to go to the car and inspect the coupler. He must first leave the car he was then on, by use of the side ladder, and was in the act of doing so when he sustained the alleged injury. Whether or not there was a proximate causal relation between the failure of the coupler to couple on impact and plaintiff's injury, appears to be a question for the jury under the authorities cited above.

In view of the foregoing considerations, the majority of the court concludes that the trial court erred to the prejudice of plaintiff in withdrawing from the consideration of the jury the failure to couple issue.

In sustaining plaintiff's assignment of error No. 2, on the ground above indicated, it becomes unnecessary to consider the failure of the trial court to give plaintiff's special requests for instructions (Nos. 4, 5, 6 and 7) as the basis for said instructions had been removed by the trial court before the request was made.

Second. Plaintiff's assignment of error No. 1. As heretofore pointed out, this action was brought under the Federal Employers' Liability Act. This statute permits recovery by an employe on the basis of negligence of the employer when engaged in interstate commerce. The probative value of evidence necessary to establish negligence is measured and determined by standards adopted by the federal courts. Bevan v. N. Y., C. & St. L. Ry. Co., 132 Ohio St., 245.

With the return of the general verdict for the plaintiff, the jury answered special interrogatories submitted by defendant and found that the defendant was guilty of negligence which proximately caused injuries and damages to plaintiff; that the nature of defendant's negligence was "no lighting—not a safe place to work". The jury also specifically found that plaintiff was guilty of contributory negligence in the proportion of 40%, proximately causing plaintiff's injuries.

The federal courts, in construing and applying the Federal Employers' Liability Act, have established the rule that if "there is an evidentiary basis for the jury's verdict" the function of a reviewing court "is exhausted when that evidentiary basis becomes apparent". "Only when there is a complete absence of probative facts to support the conclusion reached, does reversible error appear". Lavender v. Kurn, 66 S. Ct. Rep., 740 (327 U. S., 645).

See also:

Blain v. B. & O. Rd. Co., 65 Sup. Ct. Repr., 545 (323 U. S., 600);

Corey v. Southern Pac. Co., 69 Sup. Ct. Repr., 275 (335 U. S., 520);

Nickerson v. McCarthy, 69 Sup. Ct. Repr., 413 (336 U. S., 53);

Harsh v. Illinois Terminal Rd. Co., 75 Sup. Ct. Repr., 362 (348 U. S., 940).

In Tennant v. Peoria & Pekin Union Ry. Co., 64 Sup. Ct. Repr., 409 (321 U. S., 29), a wrongful death action, plaintiff recovered a verdict and judgment for $20,000.00 against defendant on the ground of negligence. On appeal, the Circuit Court held there was evidence of negligence but no substantial proof that the negligence was the proximate cause of the death of the employe and the judgment was reversed. The Supreme Court, on review, held it was not the function of the court, in an action under the Federal Employers' Liability Act, to search the record for conflicting evidence in order to take the case from the jury on the theory that the proof gives equal support to inconsistent inferences; also that the courts are not free to weigh the evidence and set aside the verdict because the jury could have drawn inferences, or because judges feel that other results are more reasonable.

In the wrongful death case of Brady v. Southern Ry. Co., 64 Sup. Ct. Repr., 232 (320 U. S., 476) plaintiff recovered a judgment of $20,000.00, which was reversed by the state Supreme Court (No. Carolina). An appeal was taken to the U. S. Supreme Court. It was held that "When evidence is such, without weighing credibility of witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, and this rule applied to questions of proximate cause".

In the instant case, the majority of the court is of the opinion that the trial court erred, to the prejudice of plaintiff, in entering judgment for defendant notwithstanding the verdict and that plaintiff's assignment of error No. 1 should be sustained.

Third. Assignments of error Nos. 3 and 4. The record discloses that the trial court, in considering defendant's motion for a new trial, after having entered judgment for

defendant, conditionally granted same pursuant to the provisions of Section 2323.181, R. C.

Plaintiff contends that said provision of the Code did not impose on the trial court the duty to grant the motion for a new trial conditionally, and further that the statute only required the court to act upon the motion.

Plaintiff further contends that, as it appears the trial court conditionally granted the motion for a new trial on the same grounds upon which final judgment for defendant was based, the "conditional order" is unauthorized and that the trial court abused its discretion.

In view of the well-considered claim of plaintiff in support of said assignments, it becomes necessary to examine the novel provisions of Sec. 2323.181, R. C., and the related Sec. 2323.18, R. C. We have found no case wherein said sections have been considered.

Sec. 2323.18, R. C., amending former Section 11601, G. C., makes provision for rendering judgment against the verdict where the motion therefor is filed pursuant to Sec. 2323.181, R. C., and further provides:

> "When a judgment has been entered upon a verdict and thereafter a judgment is entered contrary to the verdict, under the provisions of this section, the judgment previously entered upon the verdict shall be set aside."

Sec. 2323.181, R. C., is in pari materia with Section 2323.18, R. C., and must be construed together. This section fixes the times for the filing of the motion for judgment under Sec. 2323.18, R. C., and further provides that such motion may be filed before or simultaneously with the motion for a new trial.

Where both motions are filed, whether by the same party or different parties, the motion under Sec. 2323.18, R. C.,

shall first be decided by the court. We quote the provisions of the section immediately following:

> "If such motion for judgment is sustained and judgment entered thereon, then any motion for new trial filed by any party shall, nevertheless, be considered and decided by the court, and if such motion for a new trial is also sustained, that a new trial shall be had only in the event of a reversal of the judgment on motion provided for in Sec. 2323.18 of the Revised Code; however, if such motion for judgment is overruled; the court shall then consider and decide the motion or motions for new trial * * *."

The subsequent provisions of the section are not applicable here.

It appears that Sec. 2323.181, R. C., and the amendments to Sec. 11601, G. C., now Sec. 2323.18, R. C., clearly express an intention on the part of the legislature to add to the code of procedure a clarifying provision, and that intention having been put in language that is clear and unambiguous, it is the opinion of the court that the trial court did not err in giving reasonable application to the provisions of the statute in order to effectuate its manifest purpose and intention.

It is further contended by plaintiff that the trial court abused its discretion granting defendant's motion for a new trial.

Under the provisions of Sec. 6, Article IV of the Constitution of Ohio, the courts of appeals have jurisdiction to review, affirm, modify, set aside or reverse *final orders and judgments* of courts of record inferior to the Court of Appeals. Over a period of many years, the courts of Ohio have uniformly held that an order granting a new trial does not constitute a final order or judgment "unless there is an abuse of discretion by the trial court in grant-

ing such motion". Green v. Acacia Mutual Life Ins. Co., 156 Ohio St., 1.

In a number of cases subsequent to Green v. Acacia, etc., supra, the Supreme Court has re-affirmed the rule and that, unless there is an abuse of discretion on the part of the trial judge, an appeal from an order granting a motion for a new trial must be dismissed for want of jurisdiction. See:

Johnson v. O'Hara, 156 Ohio St., 117;
Lawrence v. Moore, 156 Ohio St., 375;
Schaible v. Cincinnati, 157 Ohio St., 512.

It is the unanimous conclusion of the judges of this court, that the trial court did not abuse its discretion when, pursuant to the statute, it entered a conditional order granting the defendant's motion for a new trial.

The federal courts do not appear to limit or restrict the application of local rules of procedure, or the provisions of local statutes, in actions under the Federal Employers' Liability Act, so far as they may relate to the disposition of motions for new trials.

It also appears that the doctrine of discretionary power on the part of trial courts obtains generally in federal procedure. We call attention to the case of Newcomb v. Wood, Assignee, 97 U. S., 581. In error to the Circuit Court of the United States for the Northern District of Ohio, it was held that:

> "The granting or refusing a new trial rests in the discretion of the court to which the motion is addressed, and the result cannot be made the subject of review upon writ of error."

In Miller v. Pacific Mutual Ins. Co., U. S. Dist. Ct., W. D. (Mich.) S. D., 17 Fed. Rules Decisions, p. 121, in denying the motion for a new trial, the court reviewed Rule 61, of the Federal Rules of Civil Procedure, and held that a

motion for new trial is addressed to the sound discretion of the court. See also Chautauqua Inst. v. Zimmerman, 233 F., 371, C. C. A. 6th District, certiorari denied, 37 Sup. Ct. Repr., 114 (242 U. S., 642); Big Brushy Coal & Coke Co. v. Williams, 176 Fed., 529, C. C. A. 6th District; Worthington v. Elmer, 207 Fed., 306, C. C. A. 6th District, 10 Sup. Ct. Dig., 926, for additional cases illustrating the discretionary power of the court in dealing with motions for new trial.

We have been unable to find any case under the Federal Employers' Liability Act where the issue was similar to the one now under consideration. However, the uniform recognition of discretionary power in the trial court under federal procedure, in determining issues raised on motions for new trials, strongly suggests that similar procedure would likely be followed in cases under the Federal Employers' Liability Act, and that local rules of procedure and local statutes would be given recognition in disposing of a motion for a new trial.

The defendant points out that the trial court, in ordering a new trial, followed the statute, and inferentially, that it did not abuse its discretion under the statutory mandate. The defendant also calls attention to certain alleged errors in the trial of the case and claims the verdict is excessive, and that the jury was guilty of misconduct, which prevented defendant from having a fair trial. These considerations are not before the court, on the present record, no cross-appeal having been filed.

We conclude that the trial court did not err to the prejudice of plaintiff in its order conditionally granting a new trial, No. 4879, and in the absence of a showing of abuse of discretion, the appeal should be dismissed for want of jurisdiction, the appeal not having been taken from a final

order. Plaintiff's assignments of error Nos. 3 and 4 are not sustained.

Judgment of the Court of Common Pleas is reversed as to appeal No. 4872, and as to appeal No. 4879, this court is without jurisdiction to hear the appeal and same is dismissed, and the cause is remanded thereto for a new trial.

Deeds, J., concurs.

Fess, J., concurs as to case No. 4879, but dissents as to case No. 4872.

Approved:

/s/ Amos L. Conn,
Judge.

Fess, J., dissenting.

Under the Federal Employers' Liability Act, the kind and amount of evidence required to establish negligence is to be determined and measured by the standards approved and adopted by the federal courts. Bevan v. N. Y., C. & St. L. Rd. Co., 152 Ohio St., 245. But the weight of the evidence must be more than a mere scintilla before the case may be properly left to the discretion of the jury, and when the evidence is such that without weighing the credibility of the witness there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding, thereby saving the result from the mischance of speculation over legally unfounded claims. Brady v. Southern Ry. Co. (1943), 320 U. S., 476, 483; Cf. Eckenrode v. Pennsylvania Rd. Co. (1948), 335 U. S., 329; Moore v. C. & O. Ry. Co. (1954), 340 U. S., 573. Although the Supreme Court has said that speculation can not supply the place of proof, Galloway v. U. S., 319 U. S., 372; Moore v. C. & O., supra, in Lavender v. Kurn, 327 U. S., 645, 653, the Supreme Court of Missouri held that it could be inferred that the employe could have been struck by the protruding mail hook

knob but that all reasonable minds would agree that it would be mere speculation and conjecture to say that he was so struck. The United States Supreme Court held there was evidence from which it might be inferred that the protruding mail hook struck the employe in the back of his head, saying:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Thus, the "reasonable minds may differ" doctrine announced in the Hamden Lodge case, 127 Ohio St., 469, as applied in Ohio, is given a more liberal or speculative application in the Lavender case. In Ohio, the jury is required to determine probabilities, and such determination can not be based upon possibilities. Brandt v. Mansfield R. T. Inc., 153 Ohio St., 429; Landon v. Lee Motors, 161 Ohio St., 82; Burens v. Industrial Comm., 162 Ohio St., 549; Cf. Cleveland Term. etc. v. Marsh, 63 Ohio St., 236; Gedra v. Dallmer Co., 153 Ohio St., 258; Boles v. M. W. Co., 153 Ohio St., 381; Gerich v. Republic Steel Corp., 153 Ohio St., 463; Krupar v. Procter & Gamble Co., 169 Ohio St., 489. Under *Lavender*, the jury is permitted to exercise a measure of speculation in choosing what seems to them the

most reasonable inference to be drawn from proven facts. "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear".

Since the claim with respect to couplers under the Safety Appliance Act was withdrawn by the court prior to submission of the case to the jury, the only claim before the jury, and upon which its verdict could be based, was defendant's failure to provide plaintiff with a safe place to work in each of the following particulars:

1. Icy rungs of the ladders.
2. No lights in the area of employment.
3. No means furnished plaintiff for better traction on icy surfaces.

It is to be observed that the Act provides that the defendant shall be liable for injury resulting in whole or in part from negligence of its officers, etc., or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. No specific reference is made to providing a safe place to work. Prior to its enactment, the Supreme Court had held that an employer of labor in connection with machinery provided for the use of his employes is bound to use all reasonable care and prudence for the safety of those in his service, by providing them with machinery reasonably safe and suitable for use, and if he fails in this duty, he is responsible to them for any injury which may happen to them through a defect of machinery which was, or ought to have been, known to him, and which was not known to the employes. Washington, etc. Rd. Co. v. McDade (1899), 135 U. S., 554, 570. Courts have construed the act as requiring carriers to exercise reasonable care to furnish employes safe places to work. Cf: Bailey v. Central Vermont Ry., 319 U. S., 350. Never-

theless, an unsafe place to work results from negligence in the respects enumerated in the act.

In answer to defendant's interrogatory No. 2, the jury found that the defendant was guilty of negligence consisting of "no lighting—not a safe place to work". The failure of the jury to include in its answer, icy rungs and insufficient traction, is equivalent to a finding on such items against the plaintiff. Masters v. New York Central Rd., 147 Ohio St., 293; Elio v. Akron Tr. Co., 147 Ohio St., 363, 375; Croke v. C. & O. Ry., 86 Ohio App., 483; Kirschner v. New York Central, 67 Ohio App., 165; Salley v. Wagner, 90 Ohio App., 295, 300; Johnson v. Gernon, 91 Ohio App., 529; Miljak v. Boyle, 93 Ohio App., 169; Young v. Featherstone Motors, Inc., 97 Ohio App., 158.

Plaintiff asserts that under the federal rule of unitary negligence, in testing the general verdict for plaintiff, the reviewing court, as the jury was entitled to do and did, must take all the factors and circumstances into consideration and view defendant's conduct as a whole. Union Pac. R. Co. v. Hadley, 246 U. S., 330; Bailey v. Central Vt. R. Co., 319 U. S., 350. In determining whether there was negligence, the employer's conduct may be viewed as a whole, especially where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imports character to the others. Blair v. B. & O. R. Co., 323 U. S., 600. In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. Wilkerson v. McCarthy, 336 U. S., 53, 63. In the cited cases the general verdict was not tested by answers to interrogatories, as in the instant case. Therefore, the principle possibly may not be applicable in liability cases, wherein answers to

interrogatories are made.[1] But in applying the rule in the Masters case, the unitary rule may also be applied in determining whether under all the circumstances disclosed by the evidence, the failure of the defendant to light the area was negligence, which in whole or in part contributed to plaintiff's injury. Thus, in reaching its conclusion with respect to failure to light the area, the jury may consider other circumstances, such as the condition of the weather, ice and snow, and failure of equipment.

In spite of safety precautions, railroading is a hazardous occupation, and a carrier is not to be charged with those injuries which result from the "usual risks" incident to employment on railroads—risks which cannot be eliminated through the carrier's exercise of reasonable care.[2]

On the occasions of plaintiff's accident, the weather was sub-freezing, snow or ice was on the ground, the cars and the rungs of the ladder; it was dark and no light illuminated the area. There is no guaranty by the employer that the place and machinery shall be absolutely safe, but he is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or machinery. Patton v. Texas & Pac. Ry., 179 U. S., 658, 664; Bailey v. Central Vt. Ry. Co., 319 U. S., 350.

What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the

(1) Under the Federal Rules of Civil Procedure, the submission of interrogatories and special verdicts is discretionary with the court. Skidmore v. B. & O. R. R., 167 Fed., 54.

(2) Concurring opinion of Frankfurter, J., in Teller v. Atlantic Coast Line, 318 U. S., 54, 73.

determination of the jury under all the evidence and proper instructions by the court. Gibbs v. Village of Girard, 88 Ohio St., 34, 29 Ohio Juris., 712. Cf. St. Marys Gas Co. v. Brodbeck, 114 Ohio St., 423.

The FELA imposes liability only for negligent injuries. Coray v. Southern Pac. Co., 335 U. S., 520.(3) The issue of negligence is one for juries to determine according to their finding of whether an employe's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master "liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances", bearing in mind that "the standard of care must be commensurate to the dangers of the business." Tiller v. Atlantic, C. L. R. Co., 318 U. S., 54, 67; Wilkerson v. McCarthy, 336 U. S., 53, 61; Cf. Elkins v. Wheeling & L. E. Ry., 160 Ohio St., 47, 55, citing Wilkerson and Tiller cases.

It must be recognized that a jury of laymen having no experience with respect to the operation of railroads, are not intelligently able to determine whether the conduct of a railroad in a particular case meets that degree of care commensurate with the dangers of the business.(4) The Supreme Court of Ohio has recognized that custom and usage may be a circumstance to be considered by a jury in determining whether a defendant exercised ordinary

(3) "I am not unaware that even in this opinion the court continues to pay lip service to the doctrine that liability in these cases is to be based only upon fault. But its standard of fault is such in this case as to indicate that the principle is without much practical meaning." Jackson, J., dissenting, in Wilkerson v. McCarthy, 336 U. S., 53, 76. For comment illustrating the length to which the Supreme Court has gone in requiring submission to the jury of FELA cases since Teller v. Atlantic, 318 U. S., 54, see Griswold v. Gardner, 155 Fed. 2nd, 333, 334.

(4) Neither do judges of the Supreme Court according to Justice Black, dissenting, in Brady v. Southern Ry. Co., 320 U. S., 476, 488.

care. Ault v. Hall, 119 Ohio St., 422; Witherspoon v. Haft, 157 Ohio St., 474. But because the introduction of such evidence may tend to inject collateral issues in a case, such testimony relevant upon the question may be excluded. Jones v. Village of Girard, 111 Ohio St., 258; Schwer v. New York, etc. Rd. Co., 161 Ohio St., 15. Inasmuch as such testimony, if admitted, is merely a circumstance to be considered by the jury, it was therefore proper in the instant case for the court to submit the matter of defendant's negligence to the jury for its determination upon the circumstances presented by the evidence. In determining whether a defendant exercised that care which an ordinarily and reasonably prudent man would have exercised under the same or similar circumstances, inquiry need only be made into matters within the common knowledge of men of average general information. Cf. Schwer v. New York, etc. Rd., supra; Luthy v. Terminal R. Assoc. (No. 1951), 243 S. W. 2nd, 332, 336.

Judgments against railroads, wherein inadequate lighting was a factor, have been sustained. Lavender v. Kurn, 327 U. S., 645; Tiller v. Atlantic Coast Line, 318 U. S., 54, 332 U. S., 574; Pearce v. Lehigh Valley R. Co., 157 Fed., 252 (floodlight out at time of accident); Boston, etc. R. R. v. Cabana, 148 Fed., 159; Johnston v. Elgin, etc., Ry. Co., 87 N. E. 2nd, 567, 338 Ill. App., 316; Cade v. Atchison, etc. Ry. (No. 1954), 265 S. W. 2nd, 366; Luthy v. Terminal R. Assn. (No. 1951), 243 S. W. 2nd, 332; Curtis v. Atchison, etc. Ry. Co. (No. 1952), 253 S. W. 2nd, 789. On the other hand, in a five to four decision, the Supreme Court in Brady v. Southern Ry. Co. (1943), 320 U. S., 476, 480, concluded that there was a failure to show any negligence of the carrier for not putting a light on the derailer. The dissenting opinion makes no reference to the light. See also

Kenney v. Boston & Maine R. R. (N. H., 1943), 33 A. 2nd, 557, 562.

It is therefore my conclusion that the issue of liability on the part of the defendant under the FELA was properly submitted and that the evidence was sufficient to support the finding that the defendant was negligent in failing to provide lighting, and by reason thereof, a safe place to work.

Prior to a discussion of the issue of proximate cause, some reference should be made to the contention of the appellant that liability may be imposed under the Act solely on the basis of adverse weather conditions and unsafe place to work, where the carrier does not take measures to make the conditions safer. No such claim is made in the petition, and as indicated above any such claim arising under the evidence is excluded by the answer to the interrogatory. Furthermore, since railroads have no control over the vagaries of the weather or climatic conditions, there is no liability for injuries resulting from the mere existence of ice and snow and disconnected from other causes. The requirement of providing a safe place to work does not mean the absolute elimination of all dangers, but the elimination of those dangers which can be removed by the exercise of reasonable care. Raudenbush v. Baltimore, etc. R. Co., 160 Fed., 363, 366. Cf. Missouri P. R. Co. v. Reby, 275 U. S., 426; McGovern v. Northern P. Ry. Co., 132 Fed., 213; Detroit, T. & I. R. Co. v. Banning, 173 Fed. 2nd, 752, 755. On the other hand, the contention of the plaintiff is supported in some degree by Skidmore v. Baltimore, etc. R. Co. (1948), 167 Fed., 54; Fort Worth, etc. Ry. Co. v. Smith (1953), 206 Fed., 667; and Fugazzi v. Southern Pac. Co., 208 Fed., 205. In the *Skidmore* case, the plaintiff slipped upon an icy surface while engaged in

repairing hopper doors. For a month previous to the injury, the railroad's entire yard and place where the car was located had been covered with snow and hard ice, and the defendant had done nothing to clean it off. In the *Smith* case, the safety agreement between the railroad and its employes provided that "all necessary assistance must be given to remove snow from platforms or walks to passenger stations", and that all crossings must be kept free from snow, ice, and other obstructions. Although it was the custom to spread salt, sand or cinders over the area when covered by snow or sleet, no such precautions were taken prior to the injury. The court recognized the general rule that a railroad is not liable for injuries resulting from climatic conditions, such as ice and snow, but held under the circumstances that there was sufficient evidence to go to the jury on the question of the exercise of reasonable care in furnishing a safe place to work. The judgment was reversed on other grounds. In the *Fugazzi* case, the gist of the negligence was likewise the failure of the railroad to salt or sand the icy roof of the car upon which the plaintiff was required to make repairs.

What the railroad should have done or was reasonably required to do, in removing the ice from the rungs of the ladder upon which plaintiff in the instant case slipped, is not apparent. It is therefore my conclusion that the adverse weather condition presents an immaterial issue, except in the consideration of all the circumstances surrounding the claimed liability of the defendant in failing to light the yard.

The issue of proximate cause is invariably troublesome, perplexing, and subject to conflicting opinions between judges and courts.[5]

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(5) Since questions of negligence are questions of degree, often very nice differences of degree, judges of competency and conscience have in the past and will in the future, disagree as to whether proof in a case

The question of proximate cause of an injury is ordinarily one of fact for the jury, but the burden of proof is on the plaintiff, and if there is no evidence to support the affirmative of that issue, it becomes one of law for the court. Cobb v. Bushey, 152 Ohio St., 336; St. Louis, etc. Ry. Co. v. Mills, 271 U. S., 344, 348; New York Central R. Co. v. Ambrose, 280 U. S., 486; Atchison, etc. R. Co. v. Toops, 281 U. S., 351; Brady v. Southern Ry. Co., 320 U. S., 476. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise, in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. This rule is applicable to questions of proximate cause. Brady v. Southern Ry. Co., supra.

Furthermore, in a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff, but if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which the defendant is not legally responsible. If the cause of an injury be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing

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is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury, does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge. Frankfurter, J., concurring in Wilkerson v. McCarthy, 336 C. S., 53, 65

that his injury is a proximate result of the negligence of the defendant.[6])

The same rule applies to an action under the FELA. New York Central Rd. Co. v. Ambrose, 280 U. S., 486, 490; Pennsylvania Rd. Co. v. Chamberlain, 288 U. S., 333, 339; Atchison etc. Ry. Co. v. Toops, 281 U. S., 351, 355.[7])

Plaintiff, on direct examination, testified:

"I was coming down the side of the box car on the ladder; my foot dropped from under me; I was hanging on cautiously at the same, which I caught myself with one hand; I regained my footing and got down to the ground after crawling back down the ladder.

Q. Do you know what caused your foot to slip? A. Yes.

Q. What? A. The rung, and ladder, were icy—my foot gave way on the ice * * * I was approximately half way down the ladder at the time.

Q. When you started down and slipped, where were you going? A. I was [illegible]ing up to see what was wrong with the 21st (last) car.

Q. Tell us what you did after that, after you slipped on this ladder? A. I regained my footing on the ladder and then proceeded down the rest of the way to the ground. I was in great pain, and I went over and sat down on a tie several feet away from the track.

Q. How long did you stay there? A. Approximately five minutes."

(6) L. S. & M. S. Ry. Co. v. Andrews, 58 Ohio St., 426; Village of Willoughby v. Malone, 122 Ohio St., 315; Gedra v. Dallmer Co., 153 Ohio St., 258; Boles v. Montgomery Ward & Co., 153 Ohio St., 381; Brandt v. Mansfield Rapid Transit, Inc., 153 Ohio St., 429; Gerich v. Republic Steel Co., 153 Ohio St., 463; Krupar v. Procter & Gamble Co., 160 Ohio St., 489; Landon v. Lee Motors, 161 Ohio St., 82.

(7) The Ambrose case has not been overruled. It is cited in the majority opinion affirming a reversal of the judgment in Brady v. Southern Ry. Co., 320 U. S., 473, 488. It is also criticized by Douglas, J., in his concurring opinion in Wilkerson v. McCarthy, 336 U. S., 53, 69. No reference is made to Ambrose in the opinion in Lavender v. Kern, 327 U. S., 645, but as above indicated, Murphy, J., apparently approves a measure of speculation in choosing the most reasonable inference. This does not overrule the principle. If an injury may be more reasonably attributable to an act for which the defendant is liable than as to one for which he is not liable, the plaintiff sustains the burden of proof.

Plaintiff then proceeded to the last car, found the knuckle pin closed so that it could not make proper contact and reset the couplings. Pursuant to his signal, the cars were then coupled upon the second impact, and were moved from the cut.

Upon redirect examination, plaintiff said that he saw snow on the rungs of the ladders, by means of his switch lamp. He also testified that as he descended, the car was moving and swayed; that as he descended, he could not see below the location of the rungs of the ladder.

On cross examination, plaintiff testified:

"Q. Then while you were climbing down, you were not looking at the rungs of the ladder? A. You can't look down.

Q. You weren't, were you? A. No.

Q. And these rungs on all cars are the same distance apart anyhow, aren't they? A. I imagine they were."

It is to be noted that the area was not lighted, but plaintiff was able to see that the last car,—three car lengths away—was not moving. He carried an electric switching lantern, which was hooked over his left arm. From four years' experience, he would be familiar with the ladders and the spacing between the rungs. The evening of his injury, on a number of occasions, plaintiff had climbed up and down similar ladders, without slipping. He wore four-buckle arctics with cleats for better footing. He imagined there was snow upon the soles. He had observed snow on the rungs of the ladders.

It is common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up or down. Plaintiff testified that he could not see the rungs below. He did not have to see the rungs. He knew where the particular rung was. Furthermore, he did not miss the rung, but made contact with it and his foot

slipped. It is inconceivable that the absence of sufficient artificial lighting would even be a factor causing his foot to slip.

Plaintiff suffers from substantial permanent injury, which he attributes to the slipping of his foot upon the rung, but until Congress in its wisdom enacts a Federal Workmen's Compensation law, recovery of accidental injuries of this character can not be sustained. Plaintiff has not only failed to establish a causal connection between the failure of the defendant to provide adequate lighting, he has also failed to exclude the more reasonable inference that his injury was due to the slipping of his shoe from the rung of the ladder.

In my opinion, the evidence was sufficient to disclose a violation of the Safety Appliance Act, but there was likewise no showing of a causal relationship between the defective coupler and the injury suffered by plaintiff. Like the weather, it was merely a condition incident to the employment and not a factor proximately contributing to the injury. No error was committed by the court in withdrawing this claim from the consideration of the jury.

It is my further opinion that there is no evidence of causal relationship between the alleged negligence of the defendant as found by the jury and the injury suffered by the plaintiff. The judgment should be affirmed.

With regard to Case No. 4879, the trial court complied with the provisions of R. C. §2323.181. In the absence of a showing of abuse of discretion, the appeal should be dismissed for want of jurisdiction, with which action of the majority I concur.

APPENDIX C.

Opinion of the Supreme Court of Ohio.

(Decided February 6, 1957.)

In the Court of Common Pleas the plaintiff, a freight conductor, instituted an action under favor of the Federal Employers' Liability Act to recover damages for personal injuries suffered on January 31, 1951, when he slipped while descending the icy rungs of a ladder on a boxcar in the Rossford, Ohio, yard of the defendant railroad company.

The jury returned a verdict for the plaintiff. However, the trial court sustained the defendant's motion for a judgment *non obstante veredicto*. Also, the defendant's motion for a new trial was sustained conditionally in the event there should be a subsequent reversal of the judgment *non obstante veredicto*.

The plaintiff appealed to the Court of Appeals on questions of law from the judgment *non obstante veredicto* and also from the sustaining of the motion for a new trial. For lack of a final order, that court dismissed the appeal from the sustaining of the motion for a new trial. With one judge dissenting, the judgment *non obstante veredicto* was reversed and the cause was remanded to the Court of Common Pleas for a retrial.

The cause is in this court by reason of the allowance of the motions to certify filed by both the plaintiff and the defendant.

Per Curiam. A careful study of the record discloses no basis for the plaintiff's contention that there was an abuse of discretion on the part of the trial court in sustaining the defendant's motion for a new trial on the ground that the verdict was "contrary to law and the evidence." Hence, there was no final order in this respect, and the Court of

Appeals was not in error in dismissing the plaintiff's appeal therefrom.

Nor was the trial court in error in sustaining the defendant's motion for a new trial conditionally in the event there should be a subsequent reversal of the judgment *non obstante veredicto*. That court was simply following the plain provisions of the next-quoted parts of the pertinent statutes.

Section 2323.18, Revised Code. "When a judgment has been entered upon a verdict, and thereafter a judgment is entered contrary to the verdict under the provisions of this section, the judgment previously entered upon the verdict shall be thereby vacated and set aside."

Section 2323.181, Revised Code. "If such motion for judgment is sustained and judgment entered thereon, then any motion for a new trial filed by any party shall, nevertheless, be considered and decided by the court, and if such motion for new trial is also sustained, the journal entry shall provide that a new trial shall be had only in the event of a reversal of the judgment on the motion provided for in Section 2323.18 of the Revised Code."

The trial court obviously proceeded in accordance therewith.

The defendant's appeal involves no disputed rule of law. The sole question is whether this record discloses evidence requiring submission of this case to the jury.

The trial court held that there was no proof either of proximate causation or of negligence on the part of the defendant.

In the Court of Appeals the dissenting judge agreed with the trial court that there was no proof of proximate causation. This court concurs in that conclusion.

In response to three submitted interrogatories, the jury found the defendant negligent in but one respect, namely,

insufficient lighting to afford a safe place to work. Masters v. New York Central Rd. Co., 147 Ohio St., 293, 70 N. E. (2d), 898; 65 Corpus Juris Secundum, 1265, Section 304.

Reduced to its lowest terms, the precise question is whether the record discloses evidence from which reasonable minds may reach different conclusions as to proximate causation between the plaintiff's injuries and the defendant's negligence in failing to provide adequate lighting. Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St., 469, 189 N. E., 246; Bevan v. New York, Chicago & St. Louis Rd. Co., 132 Ohio St., 245, 6 N. E. (2d), 982.

The plaintiff testified in part as follows:

"Q. Then while you were climbing down you were not looking at the rungs of the ladder? A. You can't look down.

"Q. You weren't, were you? A. No.

"Q. And those rungs on all cars are the same distance apart anyhow, aren't they? A. I imagine they are."

The dissenting judge of the Court of Appeals makes the following pertinent comment in his opinion:

"It is to be noted that the area was not lighted, but plaintiff was able to see that the last car—three car lengths away—was not moving. He carried an electric switching lantern, which was hooked over his left arm. From four years' experience, he would be familiar with ladders and the spacing between the rungs. The evening of his injury, on a number of occasions, plaintiff had climbed up and down similar ladders, without slipping. He wore four-buckle arctics with cleats for better footing. He imagined there was snow upon the soles. He had observed snow on the rungs of the ladders.

"It is common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up or down. Plaintiff testified that he could not see the rungs below. He did not have to see the rungs. He

knew where the particular rung was. Furthermore, he did not miss the rung, but made contact with it and his foot slipped. It is inconceivable that the absence of sufficient artificial lighting would even be a factor causing his foot to slip.

"* * * Plaintiff has not only failed to establish a causal connection between the failure of the defendant to provide adequate lighting, he has also failed to exclude the more reasonable inference that his injury was due to the slipping of his shoe from the rung of the ladder."

Consistent with the foregoing reasoning, the Court of Common Pleas was not in error in sustaining the defendant's motion for a judgment notwithstanding the verdict. Hence, the judgment of the Court of Appeals must be reversed and that of the trial court affirmed.

Judgment reversed.

APPENDIX D.

Entry of the Supreme Court of Ohio.

(Dated February 6, 1957.)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellee its costs expended in this court and in the Court of Appeals taxed at $.....

Ordered, That a special mandate be sent to the Court of Common Pleas of Lucas county, Ohio to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the clerk of the Court of Appeals of Lucas county, "for entry."

APPENDIX E.

Statutes Involved.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as

being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

Title 45, U. S. C., Section 2.

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, §2, 27 Stat. 531.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.

Ohio Revised Code, Section 2323.01.

A judgment is the final determination of the rights of the parties in action. A direction of a court or judge, made or entered in writing and not included in a judgment, is an order.

Ohio Revised Code, Section 2323.18.

When upon the statements in the pleadings or upon the evidence received upon the trial, or both, one party is entitled by law to judgment in his favor, upon motion of such party, filed as provided in section 2323.181 of the Revised Code, judgment shall be so rendered by the court although the jury may have failed to reach a verdict or a verdict has been rendered against such party and a judgment entered thereon, and whether or not a motion to direct a verdict has been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. When a judgment has been entered upon a verdict, and thereafter, a judgment is entered contrary to the verdict under the provisions of this section, the judgment previously entered upon the verdict shall be thereby vacated and set aside.

This section applies, to any action or proceeding pending in the court on the effective date of this section.

Ohio Revised Code, Section 2323.181.

The motion provided for in section 2323.18 of the Revised Code (except a motion for judgment on the pleadings alone, which shall be made or filed before or during the trial and before the return of a verdict), shall be filed within ten days after the failure of the jury to reach a verdict and its discharge as evidenced by a journal entry approved by the court in writing and filed with the clerk for journalization, or within ten days after the journal entry of judgment in conformity to the verdict shall have been approved by the court in writing and filed with the clerk for journalization. Such motion may be filed before or after, or simultaneously with, the filing of a motion for a new trial; and if both of such motions are filed, whether by the same party or by different parties, the motion for

judgment provided for in section 2323.18 of the Revised Code shall be first decided by the court. If such motion for judgment is sustained and judgment entered thereon, then any motion for new trial filed by any party shall, nevertheless, be considered and decided by the court, and if such motion for new trial is also sustained, the journal entry shall provide that a new trial shall be had only in the event of a reversal of the judgment on the motion provided for in section 2323.18 of the Revised Code; however, if such motion for judgment is overruled, the court shall then consider and decide the motion or motions for new trial. At the discretion of the court, such motions of both kinds may be heard together or separately, but shall be acted upon in the order provided for in this section. If a motion for judgment, as provided for in section 2323.18 of the Revised Code, is sustained and judgment entered thereon, but no motion for a new trial is at the same time conditionally sustained as provided in this section, or if no motion for a new trial has been filed, the party against whom such judgment under section 2323.18 of the Revised Code has been so entered may file a motion for a new trial as in other cases.

This section applies to any action or proceeding pending in the courts on the effective date of this section.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 972.

THEODORE C. McBRIDE,
Petitioner,

vs.

THE TOLEDO TERMINAL RAILROAD COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Texts.

Statutes.

Rules of Practice.

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BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

There are only two questions presented for review. The first is whether the Supreme Court of Ohio, the dissenting judge of the Court of Appeals of Lucas County, Ohio, and the trial court were correct in their decisions that the jury verdict was not sustained by the evidence. The second question is whether this case comes within the certiorari jurisdiction of this Court.

STATUTES INVOLVED.

The only statutes other than the Federal Employers' Liability Act involved in this appeal are the Ohio statutes providing for special findings by a jury on "particular questions of fact" and the Ohio statutes referring to motions after judgment. Sections 2315.16, 2323.18 and 2323.181, Ohio Revised Code.

In his brief, petitioner has erroneously quoted the amended form of Section 2315.16 of the Ohio Revised Code rather than the form of that statute in force at the time of trial. The correct quotation of this statute appears in Appendix A of this brief, page 14.

STATEMENT OF THE CASE.

A. Developments in Courts Below.

Petitioner brought this action for damages for personal injuries under the Federal Employers' Liability Act (45 U. S. C. Section 51). He is an employee of The Toledo Terminal Railroad Company and claimed that he was injured on January 31, 1951, while working at the Rossford Yard of the respondent railroad. He stated that as he was climbing down a ladder on the side of a boxcar, one of his feet slipped off a ladder rung causing injury to his back.

This case was tried in the Common Pleas Court of Lucas County, Ohio. The jury returned a general verdict for the petitioner and, in answer to special questions, found (1) that the respondent was negligent in only one of the respects alleged in the petition and (2) that petitioner was guilty of contributory negligence to the extent of 40%. Judgment was entered on the verdict.

The respondent filed a motion for judgment and a motion for a new trial. Pursuant to Section 2323.181, Ohio Revised Code, the trial court ruled on both motions. He first granted judgment for the respondent notwithstanding the verdict, (R. 12) and later granted the motion for new trial conditioned upon the possible reversal of the judgment for the respondent. (R. 12-13.)

The petitioner took separate appeals from (1) the judgment for the defendant and (2) the order granting a new trial. After hearing, the Court of Appeals of Lucas County, Ohio (with Judge Lehr Fess dissenting) first reversed the judgment for the respondent notwithstanding the verdict. (R. 275.) Contrary to petitioner's statement (page 12 Petition for Certiorari), this Court did not restore any judgment for him because, finding no abuse of discretion, it dismissed the appeal from the order granting

a new trial "for want of jurisdiction" (not an appealable order).

The Supreme Court of Ohio, without dissent and in a *per curiam* opinion, held (1) that "the Court of Appeals was not in error in dismissing the plaintiff's appeal" from the order granting a new trial and (2) that "there was no proof of proximate causation." It affirmed the judgment of the trial court and entered final judgment for the respondent.

The dissenting opinion of Judge Lehr Fess was, in effect, adopted by the Supreme Court of Ohio. See *McBride vs. Toledo Terminal Rd. Co.*, 166 Ohio St. 129, 131, 140 N. E. 2d 319.

The issue as to the sufficiency of the evidence in this case has been considered by one trial court and two appellate courts and opinions have been written by all of these courts. They are set out in the appendices to the petition for certiorari.

B. Undisputed Facts.

The operative facts of petitioner's claim are very simple and, considering the allegations of the amended petition, the jury's answers to special questions and the admissions of the petitioner, they are undisputed and uncontradicted.

In his amended petition, McBride alleged very specific negligence. (R.3.) He stated that the respondent "knowingly caused and permitted the plaintiff to work in a place and under conditions that were unsafe * * * in each of the following particulars" (1) ice on ladder rungs on railroad cars, (2) insufficient lighting and (3) footwear insufficient for traction. He made no general claim that he was not furnished a safe place to work.

In response to special questions on respondent's negligence, the jury found that the only particular in which petitioner's place of work was unsafe was the lack of lighting. The jury's answer to this interrogatory was "no lighting—not a safe place to work." (R. 250.)

In his testimony, the petitioner admitted without qualification that as he was climbing down the boxcar ladder, *he was not able to see* the rungs below him and *could not* and *did not look at them.* (R. 119, 121.)

Petitioner testified that his foot slipped off the rung of a ladder on the side of a boxcar (No. 18 as cars are numbered on Deft's Ex. No. 1, R. 253) when he was climbing down this ladder at about 5:45 a. m. on January 31, 1951. The boxcar and ladder are illustrated by a photograph which is Deft's Ex. No. 2. (R. 255.)

Petitioner had started to work for the Toledo Terminal in 1947. (R. 67.) On January 31, 1951, he was a conductor in charge of the yard crew at the respondent's Rossford Yards. (R. 68.)

McBride and his crew started to work on the night before at about 10:30 p. m. They first checked the cars (all boxcars, R. 49) in the yard and then commenced sorting, classifying and switching the cars in the yard for placement on the track of the Larrowe Milling Company. (R. 69.) In the course of the night's work, McBride climbed up and down the ladders of many cars without difficulty. (R. 74, 75, 101, 103; 105, 110, 111.) In fact, he had climbed up and down the ladder in issue earlier in the night without slipping or other mishap. (R. 110.)

Shortly before petitioner's mishap, a cut of cars was moved into track No. 7. Boxcar No. 18 was the lead car. McBride was some distance back from the standing cars when car No. 18 was approaching. He swung onto the stirrup of the ladder at the lead end of the car as it was

moving past and rode on this ladder while No. 18 was coupled onto the standing cars. (R. 104, 112.)

McBride then climbed the ladder to reach the top of car No. 18 and released the brake on that car. (R. 105.) He gave a back-up signal, and he was still standing on the ladder when this move was started. (R. 107.) He stated that he observed that car No. 21 was not moving with the cut of cars, and he started down the ladder while the cut of cars was moving. (R. 107.)

It was at this point that McBride said that he slipped. (R. 76.) He said "the rung and ladder were icy; my foot gave away on the ice." (R. 73.) He caught himself with one hand, "regained" his footing and continued down the ladder. (R. 73.)

ARGUMENT.

A. Summary.

Under the Federal Employers' Liability Act, the employer is not an insurer of the safety of its employees. This Act requires proof of negligence and proximate cause. When there is no probative evidence on either one of these issues, the defendant is entitled to judgment as in any other negligence case. Title 45 U. S. C. Section 51; *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518; *Moore vs. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573; *Eckenrode vs. Pennsylvania Rd. Co.*, 335 U. S. 329; *Brady vs. Southern Ry. Co.*, 320 U. S. 476.

Petitioner, in his amended petition (and not the Supreme Court of Ohio) limited his claims narrowly. He made *no general allegation* that respondent failed to furnish a safe place to work. Under uniform trial practice, both the evidence and recovery were limited to the specifications in the petition. 71 C. J. S. 1098, Section 531; *Horvath vs. McCord Radiator Co.*, 100 F. 2d 326, 337, cert.

den. 308 U. S. 581; *Winzeler, etc. vs. Knox*, 109 Ohio St. 503, 517, 143 N. E. 24.

The jury found for petitioner in only one "particular," "no lighting." This constituted a jury finding against the petitioner on the other particulars alleged. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.* 147 Ohio St. 293, 298, 70 N. E. 2d 898.

The testimonial admissions of petitioner "establish the facts" that he could not and did not look at the rung of the ladder from which he slipped. (R. 119, 121.) *Kansas Transport Co. vs. Browning*, 219 F. 2d 890, 893; *Winkler vs. City of Columbus*, 149 Ohio St. 39, 77 N. E. 2d 461; 32 C. J. S. 1110, Section 1040. These and other related admissions in the record completely negative any causal relationship between "no lighting" and the mishap of which petitioner complains.

This case was fully tried to a jury and rightly decided by the Supreme Court of Ohio which correctly applied the appropriate principles of law to the issues of this case. It does not come within the certiorari jurisdiction in this Court. Rule 19 of the Revised Rules of the Supreme Court of the United States; *Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500, 524 ff.

B. Petitioner's Questions 1, 2 and 3.

Petitioner has attacked the decision of the Ohio Supreme Court with inaccurate and incomplete statements about its opinion and judgment and the considerations on which they are based. This technique is futile when the opinion and the record are themselves examined. The validity of the lower court's decision rests upon the evi-

dence and the application of fundamental principles of law to it.

The respondent is not an insurer of its employees, inasmuch as liability under the Federal Employers' Liability Act arises from negligence, not from injury. Title 45 U. S. C. Section 51; *Moore vs. Chesapeake & Ohio Ry. Co.*, 340 U. S. 573; *Brady vs. Southern Ry. Co.*, 320 U. S. 476. It was the responsibility of the lower courts to apply the negligence test honestly and not to pretend that there was sufficient evidence of negligence when none had been presented. *Eckenrode vs. Pennsylvania Rd. Co.*, 164 F. 2d 996; Affm'd 335 U. S. 329. This Court, in *Brady vs. Southern Ry. Co.*, 320 U. S. 476, 479, 483, very clearly prescribed the standard against which the evidence must be tested upon a motion for a directed verdict in Federal Employers' Liability Act cases:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. * * *
>
> * * * * *
>
> "* * * The rule as to when a directed verdict is proper heretofore referred to, is applicable to questions of proximate cause."

A fortiori, when there is no evidence of proximate cause as the Ohio trial and Supreme Courts found, the same result follows. *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518.

Petitioner states that the Ohio Supreme Court vacated a verdict and judgment for the petitioner. This is not correct. No judgment had been restored to the petitioner by the Court of Appeals and there was no judgment for petitioner in existence which could have been vacated by the Ohio court.

Petitioner argues that the Ohio court did not apply the appropriate principles of law in reaching its judgment. In this he is mistaken. The Ohio court stated as its guide the substance of the rule quoted above from the case of *Brady vs. Southern Ry. Co.*, 320 U. S. 476. See 166 Ohio St. 129, 131, where the Ohio court said:

> "Reduced to its lowest terms, the precise question is whether the record discloses evidence from which reasonable minds may reach different conclusions as to proximate causation between the plaintiff's injuries and the defendant's negligence in failing to provide adequate lighting."

The court's conclusion was, however, not that reasonable minds could not differ, but that there was *no proof of proximate causation*. At page 130 of its opinion, the Ohio court said:

> "The defendant's appeal involves no disputed rule of law. The sole question is whether this record discloses evidence requiring submission of this case to the jury.
>
> "The trial court held that there was no proof either of proximate causation or of negligence on the part of the defendant.

> "In the Court of Appeals the dissenting judge agreed with the trial court that there was *no proof* of proximate causation. *This court concurs in that conclusion.*" (Emphasis added.)

As in the *Herdman* case, 352 U. S. 518, the Ohio court based its decision largely on the admissions of the petitioner which are quoted at page 131 of its opinion.

Petitioner complains that the Ohio court unfairly construed the jury's answer to the negligence interrogatory. On the contrary, considering the pleadings, the evidence, petitioner's admissions and the issues submitted to the jury, it gave the only fair and reasonable meaning which was possible. It said:

> "In response to three submitted interrogatories, the jury found the defendant negligent in but one respect, namely, insufficient lighting to afford a safe place to work."

The petition filed in this case, as we have said before, did not contain any general allegation that respondent failed to furnish a safe place to work. Petitioner stated the very limited and specific allegation that he was required to work in a place which was "unsafe" in three "particulars," (1) ice on ladder rungs, (2) insufficient lighting and (3) insufficient footwear. (R. 3.)

Under uniform trial practice, both the evidence and recovery were limited to these specifications in the petition. 71 *C. J. S.* 1098, Section 531; *Horvath vs. McCord Radiator Co.*, 100 F. 2d 326, 337, cert. den. 308 U. S. 581; *Winzeler, etc. vs. Knox*, 109 Ohio St. 503, 517, 143 N. E. 24. As stated in 71 *C. J. S.* 1098, Section 531:

> "Since a party must succeed, if at all, on the case, claim, or defense set up in the pleadings, regardless

of what is disclosed or established by the evidence, proofs, in order to be effectual, must correspond substantially with the allegations of the pleadings. This is true under the codes as well as under the old system of pleading."

As to the three claims of negligence stated in the petition, the jury found the place of work "unsafe" in only one "particular," "no lighting." This constituted a finding against the plaintiff on the other particulars alleged. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.*, 147 O. S. 293, 298, 70 N. E. 2d 898. As stated in the case of *Container Patents Corp. vs. Stant, supra*, "the absence of any findings * * * (of the court) thereon is equivalent to a finding against the" party, "whose burden it was to sustain this proposition."

This jury's answer together with petitioner's admissions in the pleadings and his testimony that he could not and did not look at the ladder rung from which he slipped (R. 119-121) led the Ohio Supreme Court to agree with Judge Lehr Fess of the Court of Appeals in the conclusions that: "It is common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up and down. * * * It is inconceivable that the absence of sufficient artificial lighting would even be a factor causing his foot to slip."

This record discloses no probative evidence from which fair-minded men could draw a reasonable inference that there was any relationship between lack of lighting and petitioner's foot slipping from the ladder rung. *Brady vs. Southern Ry. Co.*, 320 U. S. 476; *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518.

It would unnecessarily extend this brief to discuss all the authorities cited by petitioner. However, it should be stated that the doctrine of "unitary negligence" set out in *Union Pacific Co. vs. Hadley*, 246 U. S. 330, is not applicable. This case was submitted to the jury on specific claims which were tested by interrogatory.

The case of *Panhandle & Santa Fe Ry. Co. vs. Arnold*, 283 S. W. 2d 303; cert. granted 352 U. S. 820, decided May 13, 1957, is different in several important respects. First, the Arnold petition specified an independent claim of negligence that the defendant failed to furnish a safe place to work. The McBride petition did not do so. Second, the Arnold jury made an unqualified finding that defendant had not furnished a safe place to work. The McBride jury limited its finding to the allegation of "no lighting." Third, the Arnold decision dealt with a claim of inconsistent jury findings. The McBride decision was that there is no evidence to sustain the jury's finding. Fourth, the Arnold decision did not involve admissions of plaintiff. The McBride decision was based on such admissions.

C. Petitioner's Question No. 4.

Under the Ohio procedure, a party may file a motion for judgment and a motion for new trial within ten days after the entry of judgment. Sections 2321.17, 2323.181, Ohio Revised Code. Under the latter section, if both motions are filed, the trial court is directed to rule upon the motion for judgment first and the motion for new trial second. The time for perfecting an appeal is delayed until after the court's ruling on the second of these motions. Section 2505.07, Ohio Revised Code. The Supreme Court of Ohio recognized that the trial court proceeded in accordance with these statutes.

And, contrary to petitioner's assertion, the trial judge did not grant the new trial on the same grounds on which he granted respondent's motion for judgment. (R. 13-14.)

These are matters of Ohio practice and procedure and have been approved by the Supreme Court of Ohio.

D. Petitioner's Question No. 5.

Petitioner complains that the trial court refused to submit to the jury a claimed violation of the Safety Appliance Act. 45 U. S. C., Sec. 2. Such action, if erroneous, would have afforded grounds for a new trial, but cannot be considered in support of a verdict or judgment which was not in any way based on it.

Petitioner at no time sought a new trial of this cause and, in fact, does not now seek a new trial.

E. No Jurisdiction for Certiorari.

This Court has recently reviewed its policy with respect to Rule 19 of the Revised Rules of the Supreme Court of the United States and cases arising under the Federal Employers' Liability Act. *Rogers vs. Missouri Pacific Ry. Co.*, 352 U. S. 500, 524 ff.

The two Ohio appellate courts which have considered this case show by their opinions that they observed the doctrines established by the decisions of this Court. Their conclusions apply only to the particular pleadings, interrogatories and testimonial admissions shown in this record. They have no effect or meaning beyond the borders of this lawsuit. This lawsuit was correctly decided and

does not properly come within the purview of the policy stated in Rule 19 of the Revised Rules of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Section 2315.16 Ohio Revised Code.

"§ 2315.16. Finding on questions of fact; journal entry.

"When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk."

In the Supreme Court of the United States

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THEODORE C. McBRIDE,

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vs.

THE TOLEDO TERMINAL RAILROAD COMPANY,

Respondent.

PETITION OF RESPONDENT FOR REHEARING.

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PETITION OF RESPONDENT FOR REHEARING.

Pursuant to the provisions of Rule 58 of the Revised Rules of this Court, the respondent, The Toledo Terminal Railroad Company, petitions this Court for a rehearing of the decision and judgment entered in the above case on June 24, 1957 for the reasons stated below.

I.

In this case, the respondent has been denied its day in court on the merits. Although this Court has insisted that "once certiorari is granted, the fact that the case arises under the Federal Employers' Liability Act cannot in any wise justify a failure on our part to afford the litigants the same measure of review on the merits as in every other case" (*Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500, 509), it granted the petition for certiorari and, without a hearing on the merits, summarily reversed the judgment of the Ohio Supreme Court, *McBride vs. Toledo Terminal Rd. Co.*, 166 Ohio St. 129, 140 N. E. 2d 319.

If, as indicated in the *Rogers* opinion, this proposition applies to the members of the Court who oppose any particular petition for certiorari, it should apply with equal force to those who favor granting certiorari.

As directed by Rule 24 of the Revised Rules of this Court, respondent's brief was confined to opposing and resisting the granting of the petition for writ of certiorari. It did not and could not properly have attempted to cover the merits of the issues raised on appeal.

The respondent has not been accorded "the same measure of review on the merits as in every other case."

II.

The short per curiam opinion of this Court indicates that the basis of its reversal of the judgment of the Ohio Supreme Court was its former opinion in *Rogers vs. Missouri Pacific Rd. Co.*, 352 U. S. 500. However, there are clear and controlling differences in these two cases. This would have been clearly shown had the respondent been given an opportunity by this Court to be heard on the merits.

a. The distinctions—factual and legal—between the *Rogers* case and the instant McBride case are emphasized by the fact that one member of this Court, Mr. Justice Burton, concurred in the result in *Rogers*, but dissented in the case at bar. This is a clear indication that one member of the Court agrees that the two cases are unlike.

b. The facts of the Rogers and McBride accidents are different. Rogers was injured while standing, as his work required, in a constricted area along a railroad track. A train was passing and he was attempting, in accordance with instructions, to observe the journals of the passing

train. The situation which brought about his stepping and falling was the sudden and unexpected spreading of the smoke and flames from burning brush. He had never before experienced this type of incident.

On the other hand, McBride's claims are based upon the extremely simple incident and normal operation of climbing down the ladder of a boxcar. He had climbed up and down the ladders of many cars, including the ladder on which the mishap occurred, earlier in the night's work. (R. 74, 75, 101, 103, 105, 110, 111.) Shortly before the mishap, he had "swung onto" this boxcar ladder as the car was moving past him. (R. 104, 112.) He was standing on the stirrup of this ladder when that car was coupled onto standing cars by impact. (R. 104.) Next, he climbed to the top of the ladder, released the brake, gave a "back-up signal," and remained on the ladder as this move was started. (R. 107.) It was as he was climbing down this ladder that he claimed that his foot slipped "on the ice." (R. 73, 76.)

c. The claims of negligence in the two cases are entirely different. In the *Rogers* case, the petitioner claimed negligence in that he was required to work "in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger." (pages 502-503.) McBride's claim of negligence was that the respondent "knowingly caused and permitted the plaintiff to work in a place and under conditions that were unsafe * * * in each of the following particulars" (1) ice on ladder rungs on railroad cars, (2) insufficient lighting and (3) footwear insufficient for traction. (R. 3.) These claims are far removed from those of the *Rogers* case.

d. The jury verdicts in these two cases were different, in nature, from each other. In the *Rogers* case the jury returned a general verdict finding all issues in favor of the petitioner. In the McBride case, the jury's general verdict is explained by its answers to interrogatories. The jury found (1) that the respondent was negligent in only one of the respects alleged in the petition, "insufficient lighting," and (2) that the petitioner was guilty of contributory negligence to the extent of 40%. (R. 250-251.) The first of these answers constituted, in legal effect, a finding for the respondent on the issues of ice and footwear. *St. Louis-San Francisco Ry. Co. vs. Simons*, 176 F. 2d 654, 658; *Container Patents Corp. vs. Stant*, 143 F. 2d 170, 172; cert. den. 323 U. S. 734; *Masters vs. New York Central Rd. Co.*, 147 Ohio St. 293, 298, 70 N. E. 2d 898.

The jury based its award for the petitioner on the finding of "insufficient lighting." The evidentiary support for the jury's action was more limited after it returned its verdict than before. The issues had been submitted to the jury on three grounds of negligence. The verdict was based on only one.

e. In the McBride case, petitioner's testimonial admissions determined the decision of the Ohio Supreme Court. These admissions must be conclusive upon the petitioner. *Kansas Transport Co. vs. Browning*, 219 F. 2d 890, 893; *Winkler vs. City of Columbus*, 149 Ohio St. 39, 77 N. E. 2d 461; 32 *C. J. S.* 1110, Section 1040. No such binding admissions affected the decision of the Missouri Supreme Court in the *Rogers* case.

The petitioner admitted without qualification that as he was climbing down the boxcar ladder, *he was not able to see* the rungs below him and *could not* and *did not look at them.* (R. 119, 121.) These admissions were control-

ling. In the same manner that this Court relied upon "common experience" in the *Rogers* case (page 503), the Ohio Supreme Court recognized the "common knowledge that one experienced in the use of ladders does not look his way up or down but feels his way up and down. * * * It is inconceivable that artificial lighting would even be a factor causing his foot to slip."

McBride's admissions are substantially similar to those relied upon by this Court in the case of *Herdman vs. Pennsylvania Rd. Co.*, 352 U. S. 518, in sustaining a directed verdict for the defendant railroad company.

f. The legal questions in these two cases are different. In the *Rogers* case, the question was (page 506) "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." It was necessary to apply this legal test to all the evidence in the record, because no interrogatories had been submitted.

In the McBride case, after the return of the verdict and the answers to interrogatories, the only legal question was whether the petitioner's testimonial admissions that there was no proximate causal relationship could be disregarded by the jury. The Ohio Supreme Court concluded that there was no evidence connecting "insufficient lighting" with the accident.

III.

If "once certiorari is granted" this Court is "to afford the litigants the same measure of review on the merits as in every other case," the respondent should, in all fairness, be entitled, on briefs and oral argument, with appropriate reference to the record, to present its case to this Court on the merits.

This petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE.

I, Robert B. Gosline, one of the attorneys for The Toledo Terminal Railroad Co., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for rehearing is presented to the Court in good faith and not for any purpose of delay.

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